IN THE COURT OF APPEAL AT NYERI

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

CRIMINAL APPEAL NO. 37 OF 2018

BETWEEN

BENARD MATI KATHAMBA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the Judgment of the High Court at Meru ***(R.P.V. Wendoh, J.)*** *dated 6th February 2018 in* ***H.C.CR. Case No. 47 of 2008)***

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JUDGMENT OF THE COURT

1. The appellant, Benard Mati Kathamba, was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code.** It was alleged that on 23rd June 2008 at Amwathi Sub-location, Maua Location in Igembe District within Eastern Province, he murdered Peter Kobia Kathuka (the deceased).

2. He pleaded not guilty to the charge, and the case proceeded to full hearing. The prosecution called a total of six (6) witnesses in support of its case.

3. A brief recapitulation of the evidence adduced before the trial court will help place this matter in proper perspective. The appellant and the deceased were brothers. Dickson Mwenda

Mwiti (PW1) was their nephew. He told the court that he is a son of the appellant’s

elder brother and deceased. He stated that he was called by one Samson Mukaria on the phone on 21st June 2008 and informed that his uncle, Kobia (the deceased), had been injured. He rushed to Kobia's house, called out Kobia's wife, Jacinta Kathambi PW4, who said they had been assaulted by Mati (the appellant) and that she too was seriously injured and could not move. PWl went to report to t the Maua Police Station, and they went back to the scene with police officers. PW1 also told the court that the day before this incident, the deceased had sold some land for Ksh.300,000 and both he and the appellant were witnesses; that they went to the deceased's house with the police, broke in because he was not home, and t they found some blood-stained clothes inside the house but nobody was inside.

4. Josephine Mukami (PW3), the deceased's daughter, was aged 15 years at the time she gave her evidence. She stated that the appellant was her uncle, a brother to her father. She said that the appellant used to eat in their house and lived in one of their plots; that on the evening of 23rd June 2008, the appellant went to their home, and talked to her father outside the house; that the appellant was given some money and he left; that appellant came back about midnight when she was asleep on the chair in the sitting room while her father and mother were in the

bedroom; that the intruders cut

the wire mesh in the window and opened the door; that she covered

herself and pretended to be asleep; that three people entered and she saw the appellant wearing the blue track suit he had worn earlier. She peeped through a hole in the wall which separated the sitting room and bedroom, and had been covered with a paper; she stated that she saw the appellant cut her parents as her father (the deceased) asked the appellant if he could kill his own blood, and the appellant said he wanted money. PW3 said that the appellant had a torch and she was able to see the tracksuit and knew the appellant's voice; that when she begged him to leave them, he threatened her; that the mother also begged the people to leave them and that they left, but the appellant came back with a metal rod which he thrust in the deceased's stomach.

5. She also testified that as the appellant assaulted her parents, he gave the torch to somebody else to hold and that the torch was very bright and lit up the whole room. She stated that after that, she slept till morning when her uncle (PW6), who used to take breakfast in the house, came to ask what was happening because there was blood everywhere. She stated that she informed PW6 that her uncle Mati had attacked them at night; that her uncle called for an ambulance, which took her parents to the hospital and she later recorded her statement with the police. She stated that she later saw that one of her mother's

hands was chopped off. She stated

that they left the house for Nairobi and have never gone back home.

6. Jacinta Kathambi (PW4) was the deceased's wife and a sister-in-law to the appellant. She testified that on 23rd June 2008, the appellant asked for Ksh.2,000 from the deceased at about 6.00 pm. That the appellant and the deceased left together after the appellant was given money, but the deceased came back, and later they slept; that at 2.00 am, the appellant entered the house with another person through the window demanding money. She stated that the appellant had a big torch which he flashed at them as he demanded money; she stated that the appellant and his accomplice cut the deceased on the head, legs and back and that the appellant then took a metal rod and thrust it in the deceased's stomach.

7. She stated that she begged the appellant not to kill the deceased but he ordered her to be quiet; that the appellant cut her on the forehead, and when he wanted to cut her the second time, she lifted her hand, which he cut off. She stated that she was cut on the shoulder and then stabbed below the buttocks, and after that, she became unconscious.

8. She told the court that the deceased kept calling the appellant "my brother" and told him the money he wanted was in the bank. She stated that she regained consciousness at Maua Methodist Hospital, where she recorded a statement. She stated

that she was

admitted to the hospital for over a month, and upon discharge, she

stayed at her sister's home, but at night, people used to come to their house and try to open the door and these visits by strangers prompted her to move to Nairobi. She also stated that she recognized Mati's voice as he is the only one who talked.

9. PW5, PC James Maina Thuo, of Maua Police Station, was tasked to investigate the murder. He visited the scene, and on opening the door of the house, he found the deceased lying on the bed with cuts all over the body and the stomach had a big hole. He stated that they removed the body to the mortuary; that by then the deceased had been taken to the hospital. He later found PW4 admitted with an amputated left hand and other cuts on the face and back. After PW 4 regained consciousness, she recorded a statement implicating the appellant. He testified that the appellant went to the Police Station a month later and claimed to have been in Mombasa on business and was unaware of what had happened to the deceased.

10. PW6, Samson Mukuria, a brother to Jacinta Kathambi (PW4), was living with the deceased's family, but he used to sleep in a different house. When he woke up on 24th June,2008, at about 6.00 am, while on his way to PW4's house to have breakfast, he saw blood stains on the veranda. He knocked on the door, and PW4 opened for him. He enquired on what had happened, and

she explained how they were attacked by Bernard Mati during the night. He found

PW4 lying on the floor with multiple cuts and an amputated arm, while the deceased's body was on the bed. He informed neighbours who called the police, and PW4 was taken to the hospital. He stated that he had last seen the appellant in the evening of 23rd June 2008, and had no dispute with the appellant.

11. On being placed on his defence, the appellant gave sworn testimony.

He testified that on 25th June 2008 he had arrived from Mombasa, about 1.00 pm. He went to see the deceased, whom he asked to lend him money and the deceased gave him Ksh.3,000. and he walked with him to the bus stage, where he boarded a bus to go back to Mombasa; the bus left about 3.00 pm; andt he stayed in Mombasa till 9th July 2008. He stated further that when he left Mombasa, he arrived home on 10th and met a neighbour who asked where he had been and was informed that his brother was killed and that he was being sought by police. He went to report at Maua Police Station and was later arrested and charged.

12. In the impugned judgment, on the cause of death the learned Judge held that PW4 and PW5's evidence was corroborated by the findings of Dr. Kariuki, who found that the deceased had deep cuts on the face, a cut through the neck which severed the

spinal column; a cut on forearm with fracture; multiple cuts on the lower limbs fracturing the thigh bones and lower leg; the head had deep cuts

that led to brain injury and fractures to the skull. The doctor found the cause of death to be cardio respiratory arrest due to haemorrhagic shock or excess bleeding due to deep cut wounds. The doctor was also of the view that the weapon used was heavy and sharp. The learned Judge concluded that the cause of death had been proved beyond reasonable doubt.

13. On the issue of identification of the appellant, the learned Judge acknowledged that the offence took place in the night and the witnesses and the deceased were asleep, and there was no electricity in the house. The Judge held that, according to PW3 and PW4, the only source of light was a torch, and as such, the conditions for identification were not favourable for a faultless identification. The learned Judge, therefore, warned herself of the dangers of basing a conviction on such evidence and the need to treat that evidence with circumspection. Having done so, the learned Judge found that the evidence of PW3 and PW4 corroborated each other on the identification of the appellant and was satisfied that the appellant was properly identified and recognized as being at the scene of the crime.

14. With regard to the *alibi* defence raised by the appellant, the trial Judge found that the *alibi* did not, in any way, dislodge the prosecution case, and that if at all the appellant went to

Mombasa,

he did so after committing the offence and returned after the burial when things had calmed down.

15. As to whether the appellant had malice aforethought, the trial Judge found that the injuries inflicted on the deceased spoke volumes, as the deceased had injuries virtually all over the body. The learned Judge found the nature and multiplicity of the injuries were demonstrative of the appellant's intent to either kill or cause grievous bodily harm to the deceased, and malice aforethought was, therefore, proved. The Judge also found that even if there was no dispute between the appellant and the deceased before, it emerged that there was an issue of the proceeds of land sold by the deceased. That PW4 and PW6 all said the deceased had sold land and had been paid, and the appellant wanted a share. The Judge had no doubt that, that was the cause of the attack on the deceased.

16. Aggrieved by the said verdict, the appellant seeks to overturn it, citing the following grounds appearing in the undated grounds of appeal, condensed into two by his advocate, namely: whether the identification of the appellant was safe and on severity of the sentence.

17. We heard this appeal virtually on 18th June 2025. Learned counsel Mr. Muchangi Gichugu appeared for the appellant, while

learned counsel Mr. Muriithi appeared for the respondent. Both counsel

relied entirely on their written submissions and did not make any oral highlights. The submissions by the parties are dated 13th December 2024 and 16th December 2024, respectively.

18. On behalf of the appellant, it is submitted that the identification of the appellant was not safe as the offence took place at night, and the scene was not well lit, and the witnesses who are said to have identified the appellant were said to have identified him using a torch. It was contended that none of the witnesses said they saw the appellant's face, but only spoke of his clothes and voice.

19. It was submitted further that none of the prosecution witnesses mentioned the accused at the police station, and in the statements that they all mentioned him at the trial. It was contended that the evidence on identification was an afterthought.

20. With regard to sentencing and mitigation, it was submitted that the appellant was sentenced to serve life imprisonment on 21st March 2018 and had been in custody for 17 years and was not on bail or bond at the time of trial. Counsel urged that the probation officer's report was positive and that the community and his family members have always been willing to resettle and reintegrate the appellant back in the community. It was

submitted that the appellant was a first offender, and he left behind two young children and a young wife and that the many years he has been in

prison have enabled him to reform. Counsel cited the Supreme Court decision in ***Francis Muruatetu & Another -vs- Republic [2017] eKLR,*** saying that it conferred jurisdiction on the Court to interfere with the sentence, we are urged to give a non-custodial sentence.

21. Opposing the appeal, learned counsel for the respondent, submitted that the deceased's death was not in dispute, as all the witnesses who testified confirmed such death, and, more importantly, that the post- mortem report confirmed the deceased died as a result of cardio -respiratory arrest due to haemorrhage shock secondary to severe bleeding due to deep cut wounds.

22. In regard to proof that the appellant committed the unlawful act which caused the death of the deceased, counsel submitted that the evidence of PW3 and PW4 placed the appellant at the scene of the crime. It was contended that the appellant was well-known to them and that they testified that the appellant was staying with them and that they had a good relationship with him.

23. Learned counsel submitted further that the witnesses testified that on the date in question, the appellant was wearing a tracksuit which he also wore when he attacked the deceased

later that night, and that they stated that the appellant carried a torch which he

used to light up the room during the attack. It was contended that their testimony was clear and consistent, leaving no room for doubt.

24. It was submitted that the appellant, on the other hand, raised an alibi at the last moment, but his evidence was deemed unbelievable. It was contended that the High Court correctly concluded that he was the perpetrator of the crime.

25. With regard to malice aforethought, reliance was placed on ***Nzuki***

-vs- Republic [1993] KLR 171 and ***Daniel Muthee -vs- Republic;***

Criminal Appeal No 218 of 2005(UR). It was submitted that the deceased sustained severe multiple cuts on his body; that the injuries were inflicted by a sharp object, possibly a *panga* or an axe, by repeatedly striking the deceased and that the appellant should have reasonably foreseen that his actions would result in death or grievous harm, hence malice aforethought. We are urged to uphold the High Court's conviction.

26. On the sentence, it was submitted that the appellant was sentenced to life imprisonment and that prior to sentencing, the trial court took into account his mitigation, including that he was a first-time offender, a young man full of life, had a young family

depending on him, and expressed remorse. That the court also considered his pre-sentence report, which was favorable to the appellant, but the

court's view given the circumstances under which the offence was committed was that a deterrent sentence was appropriate.

27. 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. In the oft-cited case of ***Okeno -vs- Republic*** ***(1972) EA***

32, the predecessor of this Court stated that:

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Peters -vs- Sunday Post, (1958) EA 424) ."***

28. Having carefully considered the record of appeal, submissions by

respective counsel, the authorities cited, and the law, the main issues that arise for determination are whether the offence of murder was proved beyond reasonable doubt to sustain a

conviction, and if so, whether the appellant’s sentence should be reduced.

29. 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."***

30. In the instant case, the death of the deceased is not in doubt, and we shall not belabour that issue. From the evidence adduced before the trial court, including the doctor's findings on the cause of death, we are satisfied that the deceased died from the vicious attack that was attributed to the appellant and others not before the court.

31. As to whether the appellant was properly identified as the perpetrator of the murder, we note that the appellant was placed at the scene of crime by PW3 and PW4 who witnessed the appellant attacking and cutting the deceased at their home. The trial Judge considered the direct evidence of the witnesses and stated that the two witnesses were able to recognize the

appellant through the torch he had brought at the scene which was bright enough and which the appellant had handed over to his accomplice to hold and

shine for him as he cut up the deceased and cut PW4 arms, further that both witnesses recognised the voice of the appellant whom they knew very well before as they were close relatives.

32. In ***Mbelle -vs- Republic [1984] KLR 626***, this Court set out the conditions that must be satisfied when considering evidence of voice recognition as follows:

> ***"In relation to the identification by voice, care would obviously be necessary to ensure:***
>
> ***(a) that it was the accused person's voice***
>
> ***(b) that the witness was familiar with it and recognized it, and***
>
> ***(c) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to which was said and who said it."***

33. Further, this Court in ***Vura Mwachi Rumbi -vs- Republic [2016] eKLR*** stated:

> ***"In the case of Choge -vs- R [1985] KLR 1, this Court held that evidence of voice identification is receivable and admissible and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, however, care and caution should be exercised to ensure that the witness was familiar with the appellant's voice and recognized it and that the conditions obtaining at the time the recognition made***

were such that there was no mistake in testifying to that which was said and who had said it."

See also ***Libambula -vs- Republic [2003] KLR 683, where*** this Court held that:

> ***"Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it."***

34.

35.

36. ***Reuben Taabu Anjononi & 2 Others -vs- Republic [1980] eKLR***, this Court held that:

> ***"… 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."***

The appellant was the deceased's brother and, therefore, a close

relative of the 2 witnesses. They knew him very well before, and

their evidence was that of recognition as opposed to visual

identification. When the above cited authorities are placed

alongside the evidence of PW3 and PW4, as was the learned Judge,

we too are satisfied that the appellant was recognized by the

two witnesses both visually and by voice.

37. As to whether the prosecution proved that the appellant had malice aforethought when he stabbed the deceased, **Section**

206 of the same **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."

38. Malice aforethought was succinctly discussed by this Court in ***Nzuki vs. R.*** (supra) 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."

See also ***Bonaya Tutu Ipu & Another -vs- Republic*** [2014] **eKLR**.

39. 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. The appellant killed the deceased by cutting him all over his body with a weapon which the doctor viewed as heavy and sharp. The trial Judge held that the injuries inflicted on the deceased were multiple and very grave in nature. We agree with the learned Judge on that conclusion. The chain of events or actions by the appellant clearly demonstrates that he intended to kill the deceased or inflict upon him grievous harm.

40. Considering the nature of the weapon used, described as heavy and sharp, and the fact that the deceased was unarmed and had not attacked and/or provoked the appellant, and the nature of the injuries, we find that malice aforethought was proved. The prosecution, therefore, proved malice aforethought, and consequently, all the ingredients of murder were established.

41. 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.

42. As regards the sentence, the record shows that the appellant was given an opportunity to mitigate, and he tendered his mitigation, which the trial Judge considered. The trial Judge also considered that the appellant had been in custody for close to ten years, but stated that, considering the circumstances in which the offence was committed, the appellant savagely attacked the deceased, his blood brother, and, considering the pre-sentence report which was positive held that the circumstances in which the offence was committed, called for a deterrent sentence. The learned Judge observed that the maximum sentence provided for murder was death, but handed the appellant a life sentence.

43. From the learned Judge's reference to the death penalty being the maximum sentence for murder, it is clear that she was aware of the Supreme Court decision in ***Muruatetu -vs- Republic*** (supra), which

had been made the previous year. The learned Judge handed down life imprisonment because, having considered the appellant's mitigation, she was persuaded not to hand down the

maximum sentence, which was a death sentence. Our question then becomes

whether we should interfere with the said sentence as we have been implored to do by counsel for the appellant.

44. 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."*** *[Emphasis ours].*

45. We have considered afresh, the mitigation tendered by the appellant before the trial court, and the additional mitigation contained in the submissions before us, which includes the fact that the appellant has been incarcerated for the last 15 years. But even as we review the sentence, we cannot wish away the aggravating circumstances in this case. The deceased was the appellant's blood brother; his wife, not only lost her husband, but she has had to navigate through life with one arm, her

other arm having been chopped off during the robbery. We must strike a balance between the two. Having done so, we consider a sentence

of forty (40) years imprisonment just in the circumstances of this case. Accordingly, we set aside the life sentence that was imposed on the appellant, and substitute therefor a sentence of forty (40) years imprisonment. 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. The appeal succeeds only to that extent.

Dated and delivered at Nyeri this 24th day of April, 2026.

W. KARANJA

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JUDGE OF APPEAL

S. ole KANTAI

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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