Muguongo v Republic (Criminal Appeal 26 of 2015)
[2026] KECA 758 (KLR) (24 April 2026) (Judgment)

Neutral citation: [2026] KECA 758 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 26 OF 2015

W KARANJA, K M'INOTI & A ALI-ARONI, JJA

APRIL 24, 2026

BETWEEN

PETER KIMATHI MUGUONGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Lesiit J.) dated 12th May 2011 in HCCRA No. 61 of 2004)

JUDGMENT

1. The appellant, Peter Kimathi Muguongo, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code before the High Court at Meru in HCCR Case No 61 of 2004. It was alleged that on 3rd June 2004 at Munithu Location in Meru Central District within the Eastern Province, he murdered Musa Kinyua. In the impugned judgment dated 12th May,2011, Lesiit, J. (as she then was) convicted the appellant of the offence and sentenced him to suffer death.

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. The prosecution's case stood on the testimony of 7 witnesses; PW1 No. 62535, CPL Agnes Murithi, a police officer at Nkubu Police Station, testified that on 3rd June 2004, she received a report of an assault case. She went to the scene after the victim had been moved to the hospital. At the appellant's house, they recovered a blood- stained panga, but she did not know if it belonged to the appellant. She stated that the appellant's wife had informed them that the appellant had cut himself with a panga.

4. PW2 Robert Mutuma, a 14-year-old lad at the time, testified that he was walking home from school on 3rd June 2004. He saw the appellant holding a panga approaching the deceased's house. He heard the appellant ask the deceased to give him his axe and then saw the appellant cut the deceased. He stated that the appellant's wife tried to intervene, but the appellant pushed her away and began to chase her and she ran for her dear life.

5. He testified that he saw the appellant returning to the compound with the panga, saying he would kill everyone. The witness said that he asked the appellant not to cut the deceased's wife, and the appellant chased him away, and the witness went to report to the assistant chief. In cross-examination, he confirmed being at the scene and seeing the appellant cut the deceased with the panga.

6. PW3 John Gikundi Mwirebia testified that he was a farmer and knew both the appellant and the deceased. He stated that on 3rd June 2004, he was at the assistant chief's camp when he heard screams a short distance from where he was. He stated that a child came to the assistant chief and reported an incident that had taken place at their home. The assistant chief asked him to accompany the child to his home, which he did. In the compound, he found the deceased lying down with multiple cut wounds. He stated that the appellant was nearby, wielding a panga while threatening everyone. He stated that he asked the appellant not to cut the deceased and made arrangements to take the deceased to the hospital where he succumbed to the injuries.

7. PW4, Jopheth Muriki, the deceased's brother, testified that he was cultivating his shamba on 3rd June 2004, when PW2 came running and reported that there was a fight between the appellant and the deceased and that the appellant had cut the deceased. He went to the scene and found the deceased with cuts on the top of the head, the shoulder, the hand and the palm. He stated that Bernard (PW6) asked for a piece of cloth to bandage the deceased. He stated that they took the deceased to the hospital, but he passed away on 4th June 2004. Later, he identified the body to the pathologist for a post-mortem.

8. PW5, Peter Ndumba Mugwika, the Assistant Chief, testified that on the said date at about 1 pm, he was in his office when PW1 came crying to report that the appellant was cutting another uncle. He stated that he went to the scene and found the deceased lying with multiple cuts, and Gikundi was administering first aid. In cross-examination, he stated that he did not receive any reports of previous problems between the appellant and the deceased.

9. On his part, PW6 Bernard Mbugua told the court that he was heading home on the material date and time when he learnt that the appellant had cut the deceased. He went to the deceased's home, where he found the appellant still holding a panga with the deceased lying nearby with cut wounds, which the witness helped to dress in a bid to stop the bleeding. He said that he pleaded with the appellant not to cut the deceased again. He identified the panga in court as the one he found the deceased with.

10. PW8 Dr. Isaac Macharia, a medical doctor at Meru District Hospital, performed the post-mortem on the deceased on 22nd June 2004. He stated that the deceased's body was moderately decomposed at the time and had several severe injuries, including ten (10) deep cut wounds and some open wounds to vital areas including a deep open wound under the right shoulder and another stitched wound on the

left arm, a deep cut on the face exposing the brain and bleeding within the brain. In his opinion, the cause of death was a head injury due to severe open cuts.

11. On being placed on his defence, the appellant elected to give a sworn statement. He did not call any witness in support of his defence. He stated that he was not present at the scene where the deceased was killed; he claimed he was at work until around 11:00 a.m. on the day of the incident, spent the afternoon in the nearby town of Nkubu and only returned home much later that evening. He admitted to having had an earlier scuffle with the deceased on the day of the incident over an axe. He denied that the panga recovered from his house was his or the one used to kill the deceased.

12. The learned Judge considered the above evidence and, in the impugned judgment, found that the prosecution successfully placed the appellant at the scene of the crime through credible eyewitness testimony and that two witnesses, PW1 and PW2, who were present at the scene, clearly identified the appellant with whom they were already familiar. The learned Judge found that the repeated hacking with a panga and targeting sensitive areas like the forehead, hand, and leg demonstrated a fixed intention to cause death or grievous harm to the deceased.

13. The Judge rejected the appellant's defense of self-defence that he was attacked by the deceased and that he only acted to defend himself. She found that the evidence did not show that the appellant was averting a felonious attack, but that it was the deceased who was in immediate danger, as the appellant was the one who confronted him and viciously attacked him before he could even defend himself.

14. The learned Judge found that the cause of the attack was a missing axe, which the appellant said the deceased and his wife had taken for 3 weeks without his permission or consent. She found that the appellant's attack on the deceased could not be justified. Further, the learned Judge found that there was no evidence to suggest that the appellant was in imminent danger at the time he confronted the deceased. The learned Judge concluded that the prosecution had proved beyond reasonable doubt that the appellant had formed the necessary malice aforethought to cause the death of the deceased. Accordingly, the learned Judge convicted the appellant and sentenced him to suffer death.

15. Aggrieved by the said verdict, the appellant seeks to overturn it, citing the following grounds: that the trial Judge erred in law and fact by finding that the offence of murder was proved beyond a reasonable doubt and by meting out a sentence that was not backed by the facts before the court.

16. On behalf of the appellant, learned counsel, Mr. Mahugu submitted that there was no doubt that the deceased died as a result of the injuries inflicted upon him in the course of the brawl between the him and the deceased, a position that the learned Judge rightfully reached upon hearing the defence. It was submitted that both the deceased and the appellant sustained injuries in the course of the said brawl.

17. It was the appellant's case that he had no intention whatsoever or howsoever to kill or cause grievous harm, express or implied, to his brother, particularly over an axe. According to learned counsel, the deceased and his wife called him an axe thief and that was what provoked him because the axe was his and he had looked for it for two weeks.

18. Counsel maintained that the appellant had no malice aforethought, that it was the trial court's finding that the appellant and the deceased quarrelled and that there was a confrontation culminating in a struggle in which the deceased was fatally wounded. It was contended that this did not establish the motive for the murder and that the totality of the evidence on motive is that it did not possess the certainty and consistency that would have proved that the appellant had malice aforethought, which is an essential ingredient for the offence of murder. It was contended that had the learned Judge gone into an analysis of the evidence with the thoroughness that was required, she might have arrived at a

different conclusion. Reliance was placed in Otieno - vs- Republic [2022] KEHC 13395 eKLR and Wambui -vs- Republic (Criminal Appeal 102 of 2016) [2019] KECA 906 (KLR).

19. Further, it was submitted that as a result of the error in the conviction, the sentence is unlawful and a proper candidate for quashing. We were urged to find that the sentence imposed is a proper candidate for consideration afresh in the context of Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR. In reconsidering the sentence, we were urged to consider the following factors; that on 17th December 2004, upon the charge being read the appellant readily admitted to having killed the deceased. He stated "we were fighting and that is how I killed him"; that the appellant was a first offender; has spent his prime age in prison; has spent over 2 decades in prison since his arrest; he is most remorseful and regrets how things unfolded culminating to the death of his brother and aware that he was arrested almost instantaneously; he has never even had a chance to reach out to the victims' family who are his kin to seek forgiveness and explore the possibility of reconciliation and that the appellant has since reformed.

20. We were urged to allow the appeal.

21. Learned counsel for the respondent, Ms. Mengo, submitted that all legal elements of murder were proved beyond reasonable doubt, it was submitted that the fact that Musa Kinyua died was established and that the prosecution proved that the appellant committed the unlawful act that caused the death.

22. On malice aforethought, it was submitted that this was inferred from the weapon used, a panga; the nature of injuries, which included ten (10) cuts; and the targeted body parts, which were sensitive areas. It was submitted that the post-mortem report confirmed that death was due to head injuries, and severe open cuts.

23. It was further submitted that the appellant's self-defence claim was not credible as the same was contradictory because the appellant claimed that he hit the deceased once in self-defence while the post-mortem report and eyewitness (PW2) confirmed ten (10) severe open cuts. Further, t the trial Judge noted there was no threat of a felonious attack or imminent danger to the appellant at the time of the incident. It was contended that the evidence was clear that the appellant sharpened his panga before the attack and hit the deceased ten (10) times without provocation and later cut his own hand to raise the defence of self defense. It was contended that this evidence did not displace the evidence of the prosecution and that the court rejected the same because it was not credible.

24. On the lawfulness of the sentence, learned counsel submitted that the sentence was lawful and within the trial court's discretion. It was submitted that the death penalty is the mandatory sentence under section 204 of the Penal Code, and that, based on the guidelines given in the Muruatetu case, mandatory sentences are not automatically unconstitutional. It was contended that sentencing is at the discretion of the trial court and that appellate courts should only intervene if the trial Judge applied wrong principles, considered irrelevant factors, or if the sentence is excessively harsh, none of which the respondent believes apply here.

25. Learned counsel maintained that since no sufficient reasons for interference were provided, the appeal should be dismissed. We are urged to uphold both the conviction and the sentence.

26. We have considered the evidence adduced before the trial court, the respective submissions, the authorities relied upon and the law. In our view, the issues arising for determination are:

    a. whether the prosecution's evidence was marred by contradictions;

    b. whether malice aforethought was proved;

c. whether the assault that resulted in the death of the deceased was in self defence;

d. whether the prosecution proved its case to the required standard; and

e. whether this Court should interfere with the death sentence imposed on the appellant.

27. On the issue of the contradictions that were pointed out in the prosecution evidence, our observation is that they were minor and immaterial and did not go into the root of the evidence. We say so because they did not impact on whether the deceased died, how he died and the person who inflicted the injuries that caused the death. In John Nyaga Njuki & 4 others v. Republic, Cr. App. No. 160 of 2000, this Court held as follows:

> "In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."

28. Section 203 of the Penal Code defines the offence of murder as follows:

> " Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

29. A reading of the above section shows that to succeed in a murder case, the prosecution must prove the following ingredients:

a. the death of the deceased.

b. that the death was caused by an unlawful act or omission on the part of the accused; and

c. that in causing the death of the deceased, the accused had malice aforethought.

(See this Court's decision in Titus Ngamau Musila Katitu -vs- Republic [2020] eKLR).

30. The act of death is not contested. That the unlawful act that caused the death was perpetrated by the appellant is also not in doubt. Was the assault actuated by malice aforethought?

31. Section 206 of the Penal Code, defines malice aforethought 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."

32. Malice aforethought is a critical element of the crime that distinguishes the offence of murder from other types of homicide cases, such as manslaughter.

33. Malice aforethought may be express or implied. Express malice aforethought refers to when a deliberate intention is manifested to take away the life of a person unlawfully. Implied malice aforethought applies when no considerable provocation appears or when the circumstances attending the killing show a reckless and wicked act. To be convicted of murder, malice aforethought must be proved. Malice aforethought cannot be imputed to an accused person based solely on their participation in a crime. If it is shown that the killing resulted from an intentional act with express or implied malice aforethought, no other mental state need be shown to establish malice aforethought.

34. In Nzuki -vs- Republic [1993] eKLR, this Court defined malice aforethought as:

> " ...a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of Regina v Vickers, [1957] 2 QB 664 at page 670. An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of Conliffe v Goodman, [1950] 2 KB 237."

35. In the same case, the Court went on to expound as follows:

> " 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 these acts, and commits those acts deliberately and without lawful excuse 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 succumbed. Without an intention of one of these three types, 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 not by itself enough to convert a homicide into the crime of murder. See the case of Hyam v Director of Public Prosecutions, [1975] AC 55 ."

See also Rex -vs- Tubere s/o ochen (1945) 12 EACA 63, where the predecessor of this Court stated thus on the issue of malice aforethought:

> " It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established,

and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick..."

36. In the case before us, PW2 testified that he saw the appellant carrying a panga and that he sharpened it using a file before he proceeded to the deceased's house and called him out. He stated that when the deceased came out of his house, he had nothing in his hands and was not armed. A sharp panga applied with such force and as many times as in this case manifestly demonstrates the intent to kill or cause grievous bodily harm, hence the presence of malice aforethought in this case.

37. With regard to the appellant's defence to have been acting in self- defence, it was the appellant's evidence that on the material day he had found the deceased's wife splitting firewood with an axe. When he asked her about the axe because it had been lost for 2 months, she shouted at him and called the deceased, asking him to come and see the thieves. He stated that the deceased came running armed with a panga and stabbed him in the chest. He said that they had struggled over the panga and that the deceased was cut on the right side of the face, while he also cut his right arm. He stated that the deceased's wife came and hit him on the head with a stick, and he took the panga and cut the deceased on the head, and he fell down. He stated that he left the scene and left the deceased being assaulted by his wife. That version is not supported by any other evidence and appears to us to be a figment of the appellant's imagination. It is our view that the appellant's defence that he acted in self-defence cannot hold.

38. There is evidence that the appellant inflicted deep cuts on the appellant using the panga. There were deep cuts on the head, severed blood vessels of the head, and severed brain tissues among other serious cuts, the total number of cuts were ten (10). Considering the weapon used, the number and nature of the wounds inflicted on an unarmed person on various parts of the body, particularly on his head, we can only conclude that the appellant did not intend that the deceased survive the attack. He had a clear intention either to kill or cause the deceased grievous bodily harm. This clearly demonstrates malice aforethought as defined in section 206 of the Penal Code.

39. From the foregoing, the inevitable conclusion is that the prosecution proved all the elements of the offence of murder against the appellant. Hence, the appeal against conviction is without merit and is hereby dismissed.

40. Regarding the sentence, the learned Judge sentenced the appellant to death, as it was the only sentence prescribed by the law at the time under section 204 of the Penal Code. However, the Supreme Court in Francis Karioko Muruatetu & Another - vs- Republic [2017] eKLR found that the mandatory nature of the death sentence under section 204 of the Penal Code is unconstitutional, as it does not allow the consideration of the mitigating factors put forth by the accused in order to determine an appropriate sentence that meets the ends of justice. The death sentence is, however, not outlawed as the Supreme Court held that it is still applicable as a discretionary maximum penalty.

41. A perusal of the trial court's record reveals that the appellant's mitigation was considered. The learned Judge considered the nature of the offence and the circumstances under which the offence was committed. Sentencing is essentially a matter of the court's discretion, and an appellate Court can only interfere with a sentence where the trial court improperly exercised its discretion. The sentence imposed must ultimately reflect the objective seriousness of the offence committed, and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed.

42. This decision was rendered after the Supreme Court decision in Francis Karioko Muruatetu & Another -vs- Republic (supra).

We, however, note that at the time of sentencing, the Supreme Court decision was not available and as such, the learned Judge was restricted in her sentencing as the only sentence available at the time was the mandatory death sentence. However, we note the seriousness of the offence and the gruesome manner in which it was executed. We have considered the mitigation since presented to us by learned counsel for the appellant, including the fact that he has been incarcerated since 2005.

43. The upshot of the foregoing is that the appeal against conviction is without merit and is hereby dismissed. However, the appeal against the sentence partially succeeds to the extent that the death penalty is hereby set aside. We substitute therefor a sentence of 40 years imprisonment calculated from the date of plea. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF APRIL, 2026

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