Furaha v Republic (Criminal Appeal 45 of 2020)
[2025] KECA 286 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 286 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 45 OF 2020

JW LESSIT, PM GACHOKA & GV ODUNGA, JJA

FEBRUARY 21, 2025

BETWEEN

ROMA MICHAEL FURAHA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (Nyakundi, J.) dated 21st April 2020 in H.C. CR. Case No. 15 of 2018)

JUDGMENT

1. The appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. Particulars of the offence were that on 2nd September 2018 at Kwa Ndomo area in Malindi Sub County in Kilifi County, he unlawfully murdered Lawrence Roma (deceased). The appellant was convicted and sentenced to 30 years imprisonment.

2. The prosecution called in six (6) witnesses in support of its case. The prosecution case was that the appellant was the father of the deceased, then 2½ years old. The appellant sired the deceased with PW1, Lilian Zawadi Charo. The two were not living together at the time of the incident, but the deceased child was under the care of the appellant and his mother, PW2, Peninah Karisa. PW2 told the court that on 2nd September 2018 the appellant took the deceased from her at 2 p.m. as was his custom. That he usually kept the deceased for a while before he returned him to her between 4.00 p.m. and 5. 00 p.m. That on the material day, the deceased was hardly gone for ten minutes when a bodaboda cyclist informed her to go to her son's place because he was dying. She said that she rushed there to find the deceased on the ground in critical condition, foaming from his mouth. The deceased was near him calling his father. She said that she fainted and came to at Tawfiq Hospital. That she saw the deceased and the appellant also there being attended to.

3. PW1's evidence was that she recalled that on 2nd September 2018 when she was at home in Mtangani she heard her neighbours say that her child had been poisoned and was at Twafiq Hospital. She went to the hospital and on arrival, found him in a bad state. She also learnt that the appellant was admitted at Malindi General Hospital. On the next morning, she received news that the child had died.

4. PW3, Dr. Fadya Swaleh a Medical Officer attached to Malindi County Hospital performed a postmortem on the body of the deceased and produced the postmortem report dated 5th September 2018. He testified that during his examination, externally the body had no bruises, fractures or wounds save for lacerations on both lips. He testified that after the examination of the internal system, there was mild clot on the pulmonary artery. His finding and opinion on the cause of death was death due to poisoning. He gave samples of the internal organs for analysis by the government chemist. He testified that the poisoning was confirmed by PW5, Dr. Yahya Hamisi a qualified Government Analyst.

5. PW5 testified that he received samples marked A-G comprising internal organs, collected from Dr. Fadya. He analysed the samples, noted that the sample marked G, a substance marrow, contained pesticide known as robnifos. He produced a report of his finding dated 17th April 2019.

6. PW4, Allan Chengo a qualified Clinical Officer working at Tawfiq Hospital testified that the deceased and the appellant were taken to their facility for treatment. He said that the minor complained of food poisoning and since they were not able to know the volume of poison ingested, they interrogated the appellant who had similar symptoms, and that he told them that the deceased wanted to commit suicide. On examination, the minor's heartbeat was elevated but that there was no abnormal sound from the heart or chest. The abdomen was extended with no injuries and the urinary bladder was extended. The diagnosis was food poisoning from pesticide reagent. He produced his report to that effect dated 3rd September 2018.

7. PW6, PC Percy Musyoka, was the investigating officer attached to Malindi Police Station. He testified that on 3rd September 2018 at 9.00 a.m. he received a report from two people sent by his boss, IP Getrude. They reported a murder in which the victim was at Tawfiq Hospital, Malindi. He said that he proceeded to the scene of the incident but did not find anyone there. He proceeded to Tawfiq Hospital where he found the deceased undergoing treatment. He got information that the appellant was admitted at Malindi Hospital.

8. He testified that he later participated in the postmortem on the body of the deceased and received the samples collected by the doctor who performed post mortem. He later took the samples to the Government Chemist for analysis. He also recorded statements from witnesses. When the appellant was discharged from the hospital, he said that he charged him with the offence of murder of his son.

9. The appellant gave an unsworn statement where he denied killing his son. He testified that he was a tuk tuk driver and he lived with the deceased. He stated that on 15th September 2018 at around 3.00 p.m. he was at home. The following day he went and picked his child whom he had left at home. At around 3.30 p.m. he took him to General Hospital where he learnt that his child had passed on. He then went to the police station where he was charged with killing his child through poisoning.

10. In the judgment of the learned trial Judge dated 21st April 2020, the Judge found that there was no eye witness of the incident and therefore the prosecution case was founded on circumstantial evidence. The Judge considered the elements of circumstantial evidence and reviewed the case of Musili Tulo vs. Rep, [2014] eKLR which had reviewed several cases including the locus classicus case of Rep. vs. Kipkireng Koske & Another 18 EACA 135. The Musili Tulo case, supra, discussed the principles that needed to be established in order to assist the court determine whether the inculpatory facts put forward by the prosecution were incompatible with the innocence of the accused person.

11. After evaluating the evidence and the submissions, the learned trial Judge came to the conclusion that the death of the deceased was unlawful and he had been poisoned. He found the evidence adduced connected the appellant to the offence and so convicted him of the charge of murder contrary to section 203 of the *Penal Code*. He sentenced him to 30 years imprisonment.

12. The appellant was aggrieved with the conviction and so filed his appeal to this Court. He raised three grounds of appeal; that the Judge erred for failing to consider that there was no common intention; that the prosecution did not discharge it's burden of proof under section 111 (1) of the *Evidence Act*; and, the Judge erred for not considering his defence. Thereafter, Ms. Aoko advocate came on record for the appellant and filed supplementary grounds of appeal raising the following grounds:

    1. That the Trial Court erred in law and fact by failing to find that the offence of murder was not proved beyond reasonable doubt;

    2. That the Trial Court erred in law and fact by failing to conduct a sentence hearing thereby leading to an excessive sentence and/or miscarriage of justice;

    3. That the Trial Court meted out a sentence that was extremely punitive, harsh and excessive;

    4. That the Appellant's constitution right under Article 49 (1) (f) was violated when he was held in lawful custody from 3rd September 2018 without being arraigned in Court till 2nd October 2018 thereby infringing on his constitutional rights as an arrested person and also his right to a fair trial.

13. We heard this appeal on the 18th December 2023. Learned Prosecution Counsel Mr. Gituma was present for the State while learned counsel Ms. Aoko was present for the appellant. The appellant was present logged in from Malindi Prison. Each counsel relied on their filed submissions which they highlighted briefly before us. Ms. Aoko relied on the supplementary grounds of appeal and indicated that ground 3 was an alternative ground in case the rest of the grounds fail. Learned Prosecution Counsel Mr. Gituma relied on his written submissions dated 5th November, 2023 and the respondent's list of authorities of even date.

14. We have considered the entire evidence adduced before the trial court, the record and the submissions of counsel and the cases and the law relied upon. This is a first appeal. It is settled that on a first appeal, the Court has a duty to scrutinize the evidence as stated in, Okeno vs. Republic [1972] EA 32 where it was stated that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 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 findings and conclusions; 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 v. Sunday Post, [1958] E. A. 424."

15. We shall determine the appeal in line with the issues raised, which are:

    a. Whether the prosecution proved that the autopsy carried out by PW3 was carried out on the body of the deceased;

b. Whether motive was proved;

c. Whether the learned trial Judge erred to rely on the doctrine of 'last seen with';

d. Whether the cause of death was conclusive;

e. Whether circumstantial evidence adduced in this case could found a conviction.

f. Whether the learned trial Judge considered the relevant factors before passing sentence; and,

g. The issue of violation of the appellant's constitutional rights.

Whether the autopsy carried out by PW3 was carried out on the body of the deceased.

16. The first issue raised was whether there was evidence to prove that the autopsy by PW3 was carried out on the body of the deceased. Ms. Aoko urged that the appellant does not dispute that the deceased died. However, she raised an issue whether the body upon which the postmortem was conducted was that of the deceased since no identifying witnesses were called to testify in court to confirm the same. Further, according to the post mortem report P. Exh. 1 the identifying witnesses were one Sofia Hussein and Rajab Masoud whose relationship with the deceased was not given. Counsel relied on the case of Bukenya vs. Uganda, 1972 EA for the proposition that failure to call the two crucial witnesses was fatal to the prosecution case as no explanation was given for their absence, and that therefore the Court is entitled to draw an inference that evidence of the two witnesses would not support the prosecution case. Counsel urged that the failure to call them renders P. Exh. 1 of little value.

17. Mr. Gituma in reply to the appellant's counsel's submissions, he submitted that the prosecution adduced sufficient evidence beyond reasonable doubt that led to the conviction of the appellant; that failure to call witnesses who identified the deceased body for post mortem was not a ground to acquit the appellant; that the deceased died of poisoning with the same poison that led to the admission of the appellant to hospital.

18. In response to the issue that the prosecution failed to call crucial witnesses, Mr. Gituma submitted that that could not be a ground to acquit the appellant. He submitted that during trial PW1 (Lilian) identified the appellant as her boyfriend and the deceased their child and no questions were put to the witness or the investigating officer that would have led to a dispute over the identification of the deceased.

19. We note that the issue of the identity of the body of the deceased as the one on which PW3 carried out post mortem never arose at the trial. Neither was the failure to call identifying witnesses raised as an issue. Nevertheless, we have considered this issue and analysed and examined afresh the evidence adduced at the trial. We find that the evidence of PW4, the clinician who received the deceased and the appellant at Tawfiq Hospital, the first medical personnel to come into contact with the deceased and the appellant. He testified that he tried to understand what the deceased and the appellant were complaining of. He said he interviewed the appellant who said both had taken pesticide. He also produced his report, P.Exh.2 showing the course of treatment administered on the deceased. In addition it has a history taken from the appellant, and shows both he and the deceased were in distress and irritable. PW4 testified that he treated the deceased for poisoning, and that there was no way of knowing how much he had ingested. He passed away the following morning.

20. The Government Chemist Report shows that P.C. Percy Kioko Police Number 69469 took the samples taken from the deceased by PW3 to PW5. That Police Number is the same one given by PW6 P.C. Percy Musyoka the investigating officer of this case. He also visited the deceased and the appellant in hospital on the day of the incident. He also collected the exhibits in this case, including the bottle

marked G recovered from the appellant's house. That bottle was confirmed to have the poison similar to the one found in the stomach, kidney and liver of the deceased.

21. We find that it is not a coincidence that the deceased was treated for poisoning, that his internal organs were removed for analysis and a government chemist confirmed them to have poison of the same type as was from the bottle recovered from the home of the deceased. The only conclusion to make is that the child treated for poisoning and who died a day later was the same child whose autopsy was done by the pathologist, PW3 and whose organs the pathologist removed for analysis by PW5. Nothing turns on this point.

Whether motive was proved.

22. Regarding motive, Ms. Aoko argued that the prosecution evidence showed that the appellant used to spend quality time with the deceased for the last 2 years and submitted that that was a clear indication that the appellant was committed to play his part as a loving father. Counsel relied on the case of Lubambula vs. Republic [2003] KLR 683 where this Court held:

> " Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime."

23. In response Mr. Gituma submitted that the prosecution presented sufficient evidence beyond reasonable doubt that led to the conviction of the appellant and the same was noted by the trial Judge in his judgment when he held that the evidence by the prosecution had all the hallmarks of a premeditated malice aforethought by the appellant to cause the death of the deceased. Accordingly, the trial Judge held that he was satisfied that the appellant was guilty of the offence contrary to section 203 of the *Penal Code* from which to draw an inference to support the conviction for the offence.

24. The learned trial Judge did not consider motive and in any event, motive did not arise at the trial. Under section 9(3) of the *Penal Code* motive is immaterial as a criterion to commit a crime. That was the holding by the Court in Karukenya & 4 others vs. R. [1987] KLR 458 where it stated that:

> "The prosecution is not under a duty to prove motive in so far as the duty to proof the charge against the accused person is concerned. The criminal responsibility of accused person on mensrea and actus reus are the great bulwarks of the rule of Criminal Law."

25. This Court in Libambula v R. [2003] KLR 683 2EA 547 gave the correct test in the definition of motive as follows:

> " Motive means that which makes a person do a particular act in a particular way. Motive exists for every voluntary act. Motive is not material in criminal liability, unless it is expressly declared to be so by the definition of the offence. A good motive cannot make lawful an evil act."
>
> (See also Text on Criminal Law by William Musyoka 2nd Edition Law Africa).

We say no more.

Whether the learned trial Judge erred to rely on the doctrine of 'last seen with'.

26. Ms. Aoko urged that the learned trial Judge relied heavily on the doctrine of "last seen with" to find him guilty of murder. Relying on Indian case, Ramreddy Rajeshkhanna Reddy & Another vs. State of Andhra Pradesh, JT 2006 (4) SC 16 counsel submitted that although the appellant may be the "last

person seen with" the deceased, corroboration was important and the handling of the exhibits was important too.

27. The learned trial Judge had this to say regarding:

> "The total effect of the evidence shows that this time around the accused went with the deceased so that he could assist him in getting to see a doctor. In absence of any other defence, the time difference between the point of the deceased was dropped and when he fell sick gives rise to one reasonable hypothesis that the accused sought the deceased in order to administer the poison.
>
> The parameters or requirement of section 111 of the *Evidence Act*, comes into play for the accused to bring his case within any exception to prove any facts especially within his knowledge.
>
> The accused will be taken to have willfully, deliberately and with intent did inflict serious harm by use of pesticides and must have done so with full knowledge of the inherent risk to life of the deceased."

28. The law is clear that the burden of proof always rests on the prosecution to prove the case against the accused beyond any reasonable doubt. An accused has no duty or burden imposed on him to prove his innocence. However, section 111 of the *Evidence Act* creates a statutory burden of proof that places a duty on the accused to explain certain facts particularly those peculiarly within his own knowledge. Section 111(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which casts the burden of proof on the accused provides as follows:-

> " 111.
>
> (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: ..."

29. In this case the appellant picked the deceased from his, appellant's mother [PW2], at 2 p.m. as he usually did. In the past, he would keep the child and return him at 4 p.m. or so. On the material day, he took him for only 10 [ten] minutes when news reached PW2 that the deceased was dying. PW2 found him at his house foaming in the mouth in a critical condition. The deceased was also lying next to him in a critical condition. Given these circumstances, it was upon the appellant to explain either how he and the deceased ingested the pesticide or who did it to them. Section 111 (1) creates a statutory presumption that the appellant having left with the deceased in good health knew what happened to him and the deceased to ingest the pesticide. The appellant was under a statutory obligation to give a reasonable explanation of what actually happened.

30. The appellant did not attempt to give any explanation. Instead after he admitted going for the deceased, he steered clear of explaining what happened between the time he picked him up and the time they were both admitted in hospital with pesticide poisoning. The appellant did not discharge the statutory burden placed upon him by the said section. To answer the appellant's question, section 111 of the *Evidence Act* applied to this case and the learned trial Judge was not at fault to consider it.

Whether the cause of death was conclusive.

31. Ms. Aoko urged that the cause of death was inconclusive because PW3 posted a question mark on the postmortem report against his finding of poisoning as the cause of death.

32. Mr. Gituma submitted that it was clear from exhibit 1 that the deceased died out of poisoning and the same was addressed by the trial Judge where he noted and held that the offence took place in the house of the appellant and he was admitted with the deceased minor and that they both had ingested poison. He continued that the trial Judge went further to hold that the appellant had intended to kill or to cause grievous harm to the deceased and with full knowledge of the dangerous act and its consequences, the only means was to kill himself through the same poison.

33. We understand that Ms. Aoko was dwelling on the word 'poisoning" and the question mark behind it in the pathologist's report to claim the report was inconclusive of the cause of death. That is correct with a rider. The reason the pathologist, PW3 harvested the internal organs of the deceased, and to give them to the investigating officer, and which officer handed them over to the Government Chemist, PW5, was for purposes of analysis to confirm whether there it was or not the case of poisoning. PW5 confirmed that the liver, kidney and stomach had the pesticide found in the bottle also sent to the chemist for analysis. Taking the findings of the pathologist who questioned poisoning, and the finding of the chemist confirming poisoning concludes the question mark in the positive that poisoning with pesticide was the cause of death. Nothing turns on this issue.

Whether circumstantial evidence adduced in this case could found a conviction.

34. Ms. Aoko submitted that the case was based on circumstantial evidence, urging that as there were broken chains and missing links in the prosecution case, the evidence could not found a conviction. Counsel urged that chain of events were broken including the chain of custody of crucial exhibits like the specimen removed from the body of the deceased; the bottle collected at the appellant's house and received by PW6 produced as P.Exh.5; She decried the absence of Inventory and Exhibit Memo as evidence. The other missing links cited was failure to call crucial witnesses to testify before court who were identified as the two (2) witnesses identifying that identified the body of the deceased to the pathologist; the bodaboda rider who informed PW2 of the near fatal status of the deceased and the appellant; and, the person or person who rushed the deceased and the appellant to the hospital.

35. That therefore these missing links and gaps should have been resolved in favour of the appellant.

36. She cited several cases on point including the leading case of Abanga alias Onyango vs. Republic CR. App No. 32 of 1990 (UR) in which this Court held as follows:

> "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:
>
> (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
>
> (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

37. Mr. Gituma reiterated that the evidence adduced by the prosecution was sufficient to found a conviction and that the learned trial Judge was right to find the case proved to the required standard.

38. We have considered submissions by counsel on this point. Ms. Aoko's submissions were quite elaborate and we have taken them into consideration. We shall answer each aspect of the chains Ms. Aoko urged were broken and determine whether these had any negating factor to the conviction entered by the learned Judge.

39. Counsel urged that the chain of custody of the specimen removed from the body of the deceased was broken, as well as the bottle of pesticide collected at the appellant's house. For the specimen harvested from the deceased, the organs are clearly spelt out on the post mortem report P. Exh. 1. They were also spelt out clearly in the exhibit memo received by the Government Chemist on which he based his report. As we have stated elsewhere in this judgment, PW6, the investigating officer received them and delivered them personally to PW5 for analysis, a fact PW6 confirmed. We find no breach of the chain of custody of the said exhibits.

40. As for the bottle produced as P.Exh.5. PW6 testified that he visited the house of the appellant. They were not at the scene as they had been taken to hospital. He said he received the bottle at that scene. He is also the one who handed it over to PW5 for analysis alongside the organs from the deceased. There was no broken chain in the custody of the bottle either. Counsel pointed out that the bottle was identified by PW5 as exhibit G. It will be appreciated that that marking was made by the investigating officer for purposes of the identification of the samples and exhibit handled over to the government chemist for analysis. When the case finally came to court for hearing, the trial Judge gave each exhibit presented a new identification number, while ensuring that none got similar markings.

41. Ms. Aoko decried the absence of Inventory and Exhibit Memo as evidence. We do agree that no inventories and exhibit memos were produced as exhibits. We do not find that fatal to the case. The post mortem form P. Exh. 1 was the primary record where the samples harvested from the deceased body were first recorded. We note from the government chemist report, P.Exh. 4, that PW5 acknowledge receiving all the exhibits and samples against an exhibit memo form from PW6. That memo form was not produced. We do not however think that producing it would add value to the prosecution case. This is because the bearer of the custody of all the exhibits and samples was PW6 who did not delegate the handling of any of them. There was clearly no broken chain of custody of any of these samples and exhibits.

42. The other missing links cited was failure to call crucial witnesses to testify before court. These were identified as the two (2) witnesses that identified the body of the deceased to the pathologist; the bodaboda rider who informed PW2 of the near fatal status of the deceased and the appellant; and, the person or persons who rushed the deceased and the appellant to the hospital. The test in the case of Bukenya & Another vs. Uganda, (supra), that Ms. Aoko relied on is very clear. Lutta, Ag, Vice-President of the East African Court of Appeal stated:

> " The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
>
> Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

43. Being guided by that Court, and considering the witnesses that were availed by the prosecution, we are satisfied that they availed witnesses necessary to establish the truth. We are convinced that the man who reported to PW2 about the appellant's sorry state and the one(s) who transported them to hospital

would not add any value to the prosecution case. Even without their testimony, the evidence adduced by the prosecution in this case cannot be said to be barely adequate to establish the prosecution case. Nothing turns on this point.

Whether the learned trial Judge considered the relevant factors before passing sentence.

44. Ms. Aoko urged that in regard to the sentence hearing, none was conducted. That the judgment was delivered on 21st April, 2020 and so was the sentence without a presentence report and most importantly without the appellant being given a chance to give his mitigation, not even considering his age which at the time was 22 years. Counsel urged that this led to a harsh and or punitive sentence of 30 years imprisonment. She relied on the Court of Appeal case of Bernard Kimani Gacheru vs. Republic [2002] eKLR which restated 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, sentence must depend on the facts of each case."

45. Counsel also relied on the Judiciary Sentencing Policy Guidelines at page 47 where it states:

> " The court should schedule a hearing in which it receives submissions that would impact on the sentence. Whilst the pertinent information is typically contained in the reports, the hearing provides the court with an opportunity to examine the information and seek clarity on all issues."

46. Ms. Aoko argued that the progressive jurisdiction from the High Court punishes the offenders of murder to between 7 to 10years imprisonment and submitted that the trial court gave in excess 30 years imprisonment without taking into consideration the appellant's age as the time of commission of the offence which was 22 years. Counsel relied on the case of Ayako vs. *Republic (Criminal Appeal 22 of 2018)* [2023] KECA 1563 (KLR) (8 December 2023) (Judgment) where this court converted the sentence of life imprisonment to 30 years imprisonment. In the written submissions the appellant relied in this Court's decisions in Elphas Fwamba Toili vs. Republic (Criminal Appeal 305 of 2008) [2009] KECA 293 (KLR) (29 May 2009) (Judgment) where the Court sentenced the appellant 10 years imprisonment and in Mathew Kiplalam Chepkieng vs. Republic (Criminal Appeal 89 of 2017) [2019] KECA 688 (KLR) (6 June 2019) (Judgment) where the court substituted a death sentence with 10 years' imprisonment. The appellant thus asked this Court to interfere with the sentence meted out against him and reduce it to the term already served.

47. On issue of sentencing, Mr. Gituma urged us to be guided by the decision cited by the appellant's counsel of Evans Nyamari Ayako vs. Republic, supra, where the Judges in that matter gave 30 years to be appropriate for the offence of murder and submitted that the sentence of thirty (30) years meted out against the appellant was proper and therefore he urged us not to interfere with the same. Asked by the Court where in the proceedings of the High Court we could find the mitigation of the appellant, Mr. Gituma was at pains to answer and asked us to rely on the record as it is.

48. We have thoroughly gone through the record of the trial court. There is no record showing that the appellant was ever given an opportunity to give his mitigation. What the record shows is that immediately the judgment was delivered, the sentence was also pronounced without any adjournment or conduct of a pre-sentence hearing. Although the learned Judge talks of considering mitigating circumstances and going to great length to set them out, with due respect to the Judge, there is nothing on record that such information was presented to the court. It is quite telling that the judgment and

the sentencing are under one signature; that is between the judgment and the sentence there is no signature. There is no doubt that there was no pre-sentence hearing.

49. The Judiciary Sentencing Policy Guidelines, applicable at the time at paragraph *23* titled 'Sentencing Hearing' makes it necessary to hold a hearing before sentencing the accused person. In addition to paragraph 23.1 cited by Ms. Aoko, sub- paragraph *2* gives the reasoning behind the requirement or the justification for it in the following terms:

> " 23.
>
> 2 The sentencing hearing also provides the offender with an opportunity to cross examine on any adverse information that would be prejudicial to him/her. This is in keeping with the spirit of *the Constitution* which guarantees the offender the right to adduce and challenge evidence."

50. The Sentencing Guidelines of 2023 are more elaborate and call for deliberate steps that should be taken before the hearing is scheduled. At paragraph 4.2 provides as follows:

> " 4.2 Conducting the Sentencing Hearing
>
> 4.2.1 Prior to scheduling a sentencing hearing, the court should confirm whether the accused person has received the requisite reports within a reasonable time to be able to prepare for the sentencing hearing. The court should schedule a hearing in which it receives submissions that would impact on the sentence from all relevant persons and agencies. Whilst the pertinent information is typically contained in the pre- sentence sentencing reports, and particularly probation reports in accordance with the *Probation of Offenders Act*, Cap 64, the hearing provides the court with an opportunity to examine the information and seek clarity on all issues.
>
> 4.2.2 The sentencing hearing also provides the offender with an opportunity to submit on any adverse information that would be prejudicial to him/her. This is in keeping with the spirit of *the Constitution* that guarantees the offender the right to a fair hearing.150"

51. We find that the appellant was not given a chance to mitigate before sentencing. The proceedings offended constitutional fair trial procedures in that the appellant was not given an opportunity, which has statutory underpinning of section 216 (for the High Court section 329) of the *Criminal Procedure Code*, to mitigate before sentence. In the Supreme Court decision in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR as regards the importance of mitigation in sentencing, stated as follows:

> " (42) Pursuant to Sections 216 and 329 of the *Criminal Procedure Code*, Chapter 75, Laws of Kenya, mitigation is a part of the trial process. Section 216 provides:
>
> 'The Court may, before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.

Section 329 of the *Criminal Procedure Code* provides:

> The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

(43) Therefore, from a reading of these Sections, it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavors such as when the appeal is placed before another body for clemency."

52. We agree no mitigation was given by the appellant before he was sentenced. As the Supreme stated in the above case, mitigation should be taken as it does inform or affect the sentence; further the trial court should receive the mitigation from the accused person, not through some ingenious innovation by the court as that will defeat the purpose. The court can receive more evidence on sentencing from victims and social inquiry reports from the Probation Department. Furthermore where reports are filed, the accused person has a right to challenge the same. There is no doubt that the procedure adopted by the learned trial Judge flouted fair hearing and procedural laws.

53. This Court dealt extensively with the principles that guide interference with sentencing in Bernard Kimani Gacheru vs. R. [2002] eKLR where 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, 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, or acted on a wrong principle. ..."

54. We are satisfied that a case has been made for us to interfere with the learned Judge's exercise of discretion for all the reasons we have stated herein. There is a marked difference when an accused person is given an opportunity to mitigate and where the trail court comes up with the mitigation, may be out of what they have heard during trial, or what they can glean after interacting with the case. The appellant was 22 years old when he committed this offence. He was handed down 30 years imprisonment. Given the circumstances of the case, a young father whose girlfriend has abandoned their tender age child with him, it was necessary to have a social enquiry to assist the court access the mind of the accused and the circumstances of the case in order to arrive at an appropriate sentence. All in all, we think that the sentence of 30 years imprisonment without evidence of a previous record and aggravating circumstances was harsh, taking into account the violations of fair hearing and breach of procedural. We think that the appellant's appeal against sentence should succeed.

Issue of violation of appellant's constitutional rights.

55. Ms. Aoko raised a constitutional complaint when she submitted that the appellant's constitutional rights under Article 49 (1)(f) of *the Constitution* were violated. She submitted that the appellant was arrested at his bedside at Malindi General Hospital on 3rd September 2018 and first presented in Court

on 2nd October 2018 which was contrary to Article 49 (1) (f) of *the Constitution* 2010. Further that he was held in custody at his bedside for seven (7) days. The appellant relied on the case Michael Rotich vs. Republic [2016] eKLR where the importance of the protection of personal liberty was discussed.

56. She urged that the appellant therefore seeks damages for Kshs.2 million for the inordinate long time spent in custody while being handcuffed to the hospital bed before being presented to court and places reliance in the this Court's decision in Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR.

57. We are unable to consider this complaint as it has been raised for the first time on appeal. It is a matter that should have been raised at the trial court, and its decisions thereon challenged at this level if the appellant was aggrieved by it. The purpose of an appeal is to consider whether the superior court and or the courts below erred. In the case of Mary Kitsao Ngowa & 36 Others vs. Krystalline Limited [2015] eKLR, this Court has previously dealt with such an issue and pronounced itself thus;

> "... we must also appreciate the fact that, this is not even an issue that was canvassed before the trial court...
>
> The jurisdiction of the appellate court is to look into issues that were presented before the trial court. A court cannot be said to have erred on an issue that was never argued before it. This is what the appellants have sought to do in respect of this ground of appeal. Accordingly, the learned Judge cannot be faulted for not considering or appreciating the concept of continuing injury."
>
> We say no more.

58. Having considered this appeal, we have come to the conclusion that the appeal against conviction lacks in merit and is dismissed. The appeal against sentence succeeds in part.

59. The result of this appeal is as follows:

    1. The appeal against the conviction fails and is dismissed. The judgment of the High Court Criminal Case No 45 of 2020 delivered by R. Nyakundi, J. dated is upheld.

    2. The appeal against sentence succeeds. The sentence of 30 years imprisonment is set aside, and is substituted by a sentence of 20 years imprisonment from the date of taking plea on the 2nd October 2018.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY, 2025.

J. LESIIT

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JUDGE OF APPEAL

M. GACHOKA CIArb., FCIArb.

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR