Chai alias Juma Kazungu v Republic (Criminal Appeal E085 of 2022)
[2025] KECA 185 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 185 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E085 OF 2022

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

FEBRUARY 7, 2025

BETWEEN

JUMA MWARABU CHAI ALIAS JUMA KAZUNGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court at Malindi (R. Nyakundi, J) delivered on 31st March 2022 in Malindi High Court Criminal Case No 15 of 2017)

JUDGMENT

1. The appellant, Juma Mwarabu Chai alias Juma Kazungu was charged in the High Court with the offence of murder under sections 203 and 204 of the Penal Code jointly with Mwaka Chivatsi and Raphael Maitha Kazungu, the 1st and 3rd accused, and others not before the court. The particulars of the offence are that on 15th August 2017 at Kibaoni village, jointly with others not before court theyunlawfully murdered Nyambu Shoka (the deceased).

   The appellant pleaded not guilty and the prosecution called 6 witnesses.

2. Bahati Mbitsi, PW1, the deceased's brother, testified that the 1st and 3rd accused are his uncles, and that Mwaka is his step-mother; that, on 15th August 2017, while in the forest near his home cutting trees, a child came and asked him to go home as the deceased wanted to talk to him; that, when he arrived at the deceased's home, the deceased informed him that the purchase price in respect of the land they were jointly selling to one Mr. Mwarunga was ready; that they proceeded to Mr. Mwarunga's home with the deceased and their father, but were told to come back the following day; that, on their return from Mr. Mwarunga's home, it emerged that one Kache Nyambu, their sister, had a sick child who was admitted at Kilifi Hospital; and that he went to visit the child at the hospital accompanied by the deceased where they met with the child's mother, Kache Nyambu.

3. A discussion on the cause of the child's sickness arose, and fingers were pointed at the deceased with claims that he was involved in witchcraft. Uwezo Kazungu, Salim Mwokana and Shauri Kazungu, all of whom are PW1's uncles told the deceased that a witch doctor told them that the deceased had bewitched the child. The deceased was told to go and wait for them at Kibaoni. He was later joined at the 'club' situated at Kache Nyambu's home by Shauri, Uwezo, Salim, Raphael Kazungu and the appellant. The deceased offered money for oathing and, suddenly, Uwezo who had a rungu hit the deceased on the head. PW1 then stated: "All the others attacked him. Juma Chai, Raphael Kazungu, Uwezo Kazungu, Salim Kazungu and Amani Kijiko beat him up. They used rungus to hit him on the head...Shoka (the deceased) grabbed (sic) and ran to the road. They brought him back. Shoka held to our father asking him to rescue him. The attacker's (sic) grabbled (sic) bottles and hit him on the head." The deceased ran away and was pursued whilst being beaten by the appellant and the other assailants. He later succumbed to the injuries that he had sustained.

4. When cross examined, he stated that Uwezo had a rungu, but that the 1st accused and the appellant did not have rungus.

5. James Mwaringa, PW2 testified that the deceased, PW1 and their father had visited him on the date of the incidence regarding a land sale transaction between them, but that he informed them that he had no money to pay the purchase price and, with that, they left, only for him to learn the next day that the deceased had died.

6. Dr. Ndoto Kairu, PW3 produced the post mortem report prepared by Dr. Mansoor of Kilifi Hospital. PW3 stated that the postmortem examination indicated that the deceased had multiple injuries to the head and he eventually died of hemorrhage secondary to head injury.

7. PC Leonard Muthuri, PW4 stated that the investigations were carried out by PC. Mayaka who handed over the file on the alleged incident of murder to him. He admitted that he did not conduct any additional investigations.

8. When placed on his defence, the appellant stated that he was arrested and charged with the murder of the deceased; that, on the date of the alleged incident, he was informed of the death of the deceased. He stated that he was not at the scene as he had gone to see the deceased's mother, and that, as he was walking home, he was arrested and charged.

9. After considering the evidence, the trial Judge convicted the appellant of the offence of murder and sentenced him to serve 35 years imprisonment.

10. Aggrieved, the appellant has filed an appeal to this Court on the grounds that: the learned trial judge was in error in law and facts in convicting him without considering that section 200 of the Criminal Procedure Code was violated; in failing to appreciate that the prosecution did not prove its case beyond any reasonable doubt; in convicting him without the necessary and mandatory witnesses testifying; in failing to appreciate that sections 70, 77, 163 and 164 of the *Evidence Act* were not adhered to; and that the Judge failed to record his defence and mitigation during trial.

11. The appellant's counsel also filed supplementary grounds of appeal contending that the learned trial Judge was in error in convicting the appellanton the uncorroborated evidence of a single identifying witness; in delivering thejudgment and meting out sentence in the absence of defence counsel, therebyleading to an excessive and harsh sentence, which was a miscarriage of justice.

12. When the appeal came up for hearing on a virtual platform, learned counsel for the appellant, Ms. Aoko informed the Court that they will only rely on the supplementary grounds of appeal and the written submissions. On the first issue it was submitted that the learned trial Judge was in error in convicting

the appellant on the basis of the uncorroborated evidence of a single identifying witness which did not link him to the offence; and that the court failed to warn itself of the dangers of convicting on such evidence. It was further submitted that PW1 contradicted himself as, on the one hand, he stated that rungus were used in the attack, whilst, on the other hand, he said no rungus were used; and that he failed to further state how the appellant participated in the assault of the deceased. It was argued that without a rungu, it was not shown how the appellant assaulted the deceased, and that being mentioned among the persons chasing the deceased did not mean that he actively assaulted him; that PW1 should have clearly stated that the appellant hit the deceased, and how.

13. Counsel further asserted that the witness did not state what time the attack took place or the distance from the appellant or the lighting in the 'mnazi" den; and that, therefore, the trial court wrongly convicted the appellant on uncorroborated and contradictory evidence that did not connect him to the offence and, as such, the conviction was unsafe.

14. Next, counsel submitted that there was a failure on the part of the prosecution to call crucial witnesses; that Salim Mwakona, Shauri Kazungu, Kazungu Nyambu and PW1's father were among the witnesses who were not called to testify; that, from the evidence on record, it is clear that these persons were present at the scene of crime before, during and after the deceased met his death; that similarly the prosecution failed to call PC Faith Chemiat, PC Johnstone Charo and PC Harrison Mayaka, and no explanation was given as to why they did not testify. It was contended that such failure would infer that the witnesses would have been adverse to the prosecution's case, and that this Court should so find.

15. Turning to the sentence, counsel pointed out that there were no proceedings leading up to sentencing; that the Judgment and sentence were delivered on the same day in the absence of the appellant's counsel; that, even though the Judgment refers to a probation and pre-sentence report, there is no evidence of production of a probation report or any mitigation; and that, therefore, no sentencing hearing took place which led to a sentence that was manifestly excessive and harsh, and which was a miscarriage of justice. We were urged to interfere with the sentence of 35 years, more particularly for the reasons that the appellant was a first offender who was only 20 years old at the time of the offence and 25 years old at the time of sentencing; and that the sentence was excessive owing to the life expectancy of a Kenyan male. Counsel proposed a reduction in the sentence to between 10 and 15 years, or to the period already served.

16. On their part, learned prosecution counsel for the State, Ms. Nyawinda submitted that the prosecution proved their case to the required standards, and that the death of the deceased was proved through the postmortem report. Counsel further submitted that PW1 witnessed the appellant, the 1st and 2nd accused, and others not before Court, attack the deceased and beat him with a rungu on his head; that he cried for help and tried to ran away, but that they chased him and continued assaulting him until he succumbed to the injuries.

17. Counsel submitted that malice aforethought was established by the conduct of the appellant who participated in the attack on the deceased; that the appellant a close family member together with others hatched a plan to eliminate the deceased. Further, the injuries he sustained as shown in the postmortem report clearly showed that the appellant together with others were intent on murdering him.

18. This being a first appeal, this Court's duty is to submit the evidence as a whole to a fresh and exhaustive examination so as to arrive at its own independent findings on the evidence. The Court must itself weigh conflicting evidence and draw its own conclusions. See Kiilu & Another vs Republic [2005] 1 KLR.

19. Based on the record of appeal and the parties' submissions, the issues that arise for determination in this appeal are: i) whether the prosecution proved the offence of murder to the required standards; ii)

whether the prosecution failed to call crucial witnesses; and iii) whether the sentence was harsh and excessive.

20. Turning to the issue as to whether the Prosecution proved the offence of murder to the required standards. Ssection 203 of the Penal Code makes provision for the offence thus:

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

21. In order for the offence to be established, four crucial ingredients must be proved beyond a reasonable doubt by the prosecution. These are: a) The fact of the death of the deceased; b) The cause of such death; c) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly, d) Proof that the said unlawful act or omission was committed with malice aforethought.

22. Restating the ingredients necessary to establish the offence of murder in the case of Chiragu & another vs. Republic [2021] KECA 342 (KLR), this Court restated that:

> "The prosecution in an information of murder has the singular task of proving the following three ingredients in order to secure a conviction; that the death of the deceased occurred; that the death was caused by an unlawful act of commission or omission by the appellant and that the appellant had malice aforethought as he committed the said act."

23. On the fact of the death of the deceased, there cannot be any doubt that the deceased died. This was established by the evidence of PW1 and PW3 and the postmortem report adduced by Dr. Kairu on behalf of Dr. Mansoor, which indicated that the deceased died from multiple injuries on the head. There were temporal bone fractures on the left and right of the head and a cut wound at the front of the head exposing brain matter. He also had bruises on his back.

24. Next is the issue as to whether the evidence adduced before the trial court was sufficient to establish whether the appellant caused the fatal injuries that led to the death of the deceased.

24. PW 1's evidence was that he saw the appellant together with 4 others attack the deceased. When the deceased tried to run away, they pursued him and beat him to death on the allegation that he had bewitched the appellant's child.

25. The trial Judge in convicting the appellant for the offence relied on the doctrine of common intention, which under section 21 of the Penal Code is defined as:

> "When two or more persons from a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

26. In the case of Ali Salim Bahati & another vs Republic [2019] eKLR, this Court held:

> "... it is difficult in the case of mob justice, such as in this case, to pin point that a blow or assault by a particular person in the group led to a victim's death. It is in such circumstances that the provisions of Section 21 of the Penal Code come into play. The section stipulates:
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> > "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable

consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

27. The elements on the principle of common intention were defined in the cases of Njoroge vs Republic[1983] KLR 197 and Solomon Munga vs Republic [1965] EA 363 thus:

> "If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they actually aided or abated or not, provided that the death was caused by act of someone of the party in the course of the endeavors to effect the common object of the assembly."

28. This Court also considered the doctrine of common intention in the case of Dickson Mwangi Munene & another vs Republic [2014] eKLR and had this to say:

> "This provision has been interpreted and the doctrine of common intention dealt with by our courts in several cases. In Solomon Mungai v.Republic [1965] E.A. 363, the predecessor of this Court held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged."

29. The elements for application of the doctrine of common intention were adopted by this Court in the case of Stephen Ariga & another vs Republic [2018] eKLR, as established in Eunice Musenya Ndui vs Republic [2011] eKLR thus:

(1) There must be two or more persons;

2. The persons must form a common intention;

3. The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;

4. An offence must be committed in the process;

5. The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose".

30. Applying the listed requirements to the facts of the instant case in terms of the first requirement, the evidence shows that the appellant was present at the scene. Secondly, he was with 5 others, one of whom beating the deceased with a stick, (rungu) thirdly, it is clear that a common intention was contrived in the course of beating the deceased and, satisfying the 4th and 5th requirements, their illegal actions resulted in the death of the deceased. In the result, following our reanalysis of the evidence before the trial court, we are satisfied that all the requirements for establishing a common purpose were duly met, which would lead us to conclude, as did the learned Judge, that, the appellant had a common intention together with others to murder the deceased.

31. Having so found, the appellant has challenged his conviction by the trial court arguing that there was nothing in the evidence that linked him to the offence; and that the trial court was wrong to convict him solely on the basis of the uncorroborated and contradictory evidence of PW1 who was a single identifying witness.

32. On his identification, the trial Judge had this to say:

> "I am convinced to hold that the prosecution has sufficiently adduced evidence to lead to a definite conclusion that the accused persons were at the scene and did participate in killing the deceased".

32. In so concluding, the Judge relied on the evidence of PW1 and PW2 even though PW2 was not present at the scene. In effect, PW1 was the only witness at the scene who identified the appellant.

33. In the case of_ Abdallah Bin Wendo & Another vs R 20 EACA 168, it was expressed that:

> "Subject to certain well-known exemptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is the evidence, whether it was circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from error."

34. In the case of_ Cleophas Otieno Wamunga vs Republic (1989) eKLR, this Court stated thus:

> "...it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

35. According to PW1, the 5 assailants are his uncles, and that Shauri, Uwezo and Salim were joined by Raphael Kazungu and the appellant at the club at Kache Nyambu's home after the two were called to attend the meeting. Therefore, the appellant being one of his uncles was identified through recognition, which identification is more satisfactory, reassuring and reliable because it is dependent upon personal knowledge. See Anjononi & Others vs.Republic [1980] KLR 59. Further, the evidence does not point to the existence of any difficulty in the conditions for identification of the appellant by PW1. Based on the facts, we cannot fault the learned Judge's holding that the appellant was properly identified at the scene, and that he actively participated in the unlawful assault on the deceased, which resulted in his death.

36. As to whether there were contradictions in the evidence, PW1 was clear that Uwezo had a rungu and was the first to hit the deceased on the head, prompting the other assailants to follow suit. Although he stated that the others including the appellant did not have rungus, he was emphatic that they beat him and hit him with bottles. He tried to run away, and they pursued him whilst continuing to beat him. The deceased thereafter succumbed to his injuries. We are unable to find any material contradictions in PW1's evidence that were fatal to the prosecution's case. This ground is unfounded and without merit.

37. Having so found, was malice aforethought proved? In a detailed analysis of the evidence and whether it pointed to malice aforethought, the trial Judge stated:

> "In the instant case the intention to kill can be inferred from the evidence of PW1 who told the court on how the accused plan to execute the offence against the deceased under the mistaken belief that he had bewitched his grandchild. According to one on the 15.8.2017 he witnessed the brutal killing of the deceased jointly by the accused persons using all manner of weapons identified as rungus and bottles targeted at the vulnerable parts of the

body. The postmortem report admitted in evidence showed the deceased having suffered multiple fractures on both right and left deep to expose the brain matter. That is how the bleeding of the deceased organs was triggered by the multiple injuries. The cause of death was opined to be hemorrhage and head injury. The fact of malice to this case set out by (PW1) and corroborated by the medical evidence shows the injury sustained by the deceased were inflicted repeatedly with the intention to cause death or to do grievous harm. The head is a vulnerable part of the body whose injury dismeted other parts of the human body. The evidence of (PW1) is crucial because he was at the scene of the murder. The witness further demonstrated that the accused conduct was such that despite the deceased pleading for mercy, they could not relent in inflicting more harm. Although the deceased made attempts to run away, the accused went after him to ensure that the actual violence inflicted caused death or grievous harm to the deceased...The foregoing disposes the ingredient on malice aforthought".

38. The evidence of PW1 together with the postmortem report, as captured in the trial court's Judgment, provide a graphic depiction of the events as they unfolded. They describe in detail the way in which the appellant together with others were determined to inflict grievous injuries on the deceased, which ultimately led to his death. The nature of the injuries, including the bruises to the back sustained as he tried to run away, are consistent with the vicious assault borne by the deceased. There is no doubt that the injuries sustained through the merciless and incessant blows to the most vulnerable parts of his body including his head were driven by malice and impunity.

39. In the case of_ Republic vs Tubere s/o Ochen [1945] 12 EACA 63, the court identified those circumstances on which to infer the existence of malice aforethought:

> "The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab wound or multiple injuries; the conduct of the accused before, during, and after the incident."

40. Whilst in the case of_ Rwabugande vs Uganda (Criminal Appeal 25 of 2014) [2017] UGSC 8, the court held that

> "Circumstances from which an inference of malicious intent can be deduced are: (a) The weapon used, (b) the part of the body targeted i.e. whether it is a vulnerable part or not, (c) the manner in which the weapon was used i.e. whether repeatedly or not, or number of injuries inflicted and (d) the conduct of the accused before, during and after the incident i.e. whether there was impunity."

41. From the afore cited authorities, which demonstrate the manner in which malice aforethought may be inferred, there is no doubt that, in the instant case, the appellant's unlawful actions that lead to the death were based on malice aforethought, and we so find.

42. Concerning the complaint that the prosecution failed to call crucial witnesses, in addressing a similar argument in the case of_ Julius Kalewa Mutunga _ vs Republic [2006] eKLR, this Court expressed:

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

43. Further, section 143 of the *Evidence Act* provides that:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

44. It is therefore the responsibility of the prosecution to call witnesses who are sufficient to prove its case. In the case of Keter vs Republic [2007] EA 135, this Court held:

45. That the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond reasonable doubt.

46. The record shows that the prosecution witnesses who testified sufficiently proved that the appellant committed the crime for which he is charged. Much as he has questioned the prosecution's failure to call other witnesses, nothing stopped him from calling them in his defence and, in particular, PW1's father. Further, from a consideration of PC. Mayaka, the initial investigating officer's statement, it would appear that the witnesses referred to were suspects who remained at large and could not be traced. They were not therefore available to testify. As concerns the evidence of PC Faith Chemiat, PC Johnstone Charo and PC Harrison Mayaka, given that they did not witness the attack, we are not persuaded that their evidence would have added any value to the prosecution's case. This ground has no merit and is therefore dismissed.

47. We now turn to consider the sentence. Counsel for appellant contended that the trial court was in error in law and fact by delivering the Judgment and meting out the sentence in the absence of Defence Counsel, and the conduct of mitigation thereby leading to an extremely punitive, harsh and excessive sentence, which was a miscarriage of justice.

48. The importance of mitigation during sentencing was emphasized by the supreme Court in the case of_ Francis Muruatetu & Another vs Republic [2017] eKLR where the court stated:

> 45. "To our minds what Section 204 of the Penal Code is essentially saying to a convict is that he or she cannot be heard on why in all the circumstances of his/her case. The death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless, as illustrated by the foregoing Court of Appeal decision. Try as we might we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.
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> 46. We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in *the constitution* does not deprive it of the necessity and essence in the fair trial process. In any case, the right pertaining to fair trial of an accused pursuant to Article 50 (2) of *the Constitution* are not exhaustive."

49. The court proceeded to pronounce itself thus:

> 58. "We now lay to rest the quagmire that has plagued the court with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors in sentencing an accused person charged with and found guilty of that offence. To do otherwise will

render a trial, with the resulting sentence under Section 204 of the Penal Code unfair thereby conflicting with article 25(c), 28, 48 and 50(1) and (2) (g) of *the Constitution*."

50. In the Judgment, the trial Judge indicated that consideration was given to the appellant's mitigation, yet there was no record of the actual mitigation or the sentencing proceedings. The particulars of the mitigation enables an appellate court to appreciate the reasons or factors which the trial court took into account when determining the appropriate sentence to impose in a particular case.

51. Bearing in mind that, in a first appeal our duty is to re-evaluate and re- analyse afresh the evidence adduced in the trial court and arrive at our own conclusion, the absence of the sentencing proceedings notwithstanding, we have a duty, based on the submission made before us, vary or maintain the sentence imposed by the trial court. In varying the sentence, we could either enhance or reduce it, if in our view, the trial court took into account factors it did not take into account or, failed to take into account factors it ought to have taken into, or the sentence passed is excessively harsh or lenient. We are further alive to the fact that, sentencing is essentially an exercise of the discretion of a trial court unless the sentence as prescribed is coached in mandatory terms.

52. In_ Shaddrack Kipkoech Kogo vs Republic-Criminal Appeal No. 253 of 2003 (unreported), this Court sitting in Eldoret (Omollo, O'Kubasu & Onyango Otieno, JJ.A.) stated:

> "Sentence is essentially an exercise of discretion of the trial court and for this Court to interfere, it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or failed to take into account a relevant factor or that a wrong principle was applied or short of those the sentence itself is so harsh and excessive that an error in principle must be inferred."

53. In in_ Omuse vs Republic (2009), KLR, 214, this Court by a bench differently constituted (O'Kubasu, Waki, & Onyango Otieno, JJ.A.), laid down the principles to be considered in sentencing thus:

> "In Macharia vs R. (2003) EA, 559, this Court stated: 'The principle upon which this Court will act in exercising its jurisdiction to review or alter the sentence imposed by the court have benn firmely settled as far back as 1954, in the case of Ogola S/O Owour (1954) EACA, 270 wherein the predecessor of this Court stated:
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> > "The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion exercised by a trial Judge, unless as wesaid in James Vs R (1950)18 EACA, 147, it is evident that the Judge acted upon some wrong principles or overlooked some material factors. To this, we should also add a third criterion, namely that the sentence is manifestly excessive in view of the circumstances of the case (R VS SHERXHAWSKY (1912) CCA 28 TLR,263. Further, the law is that sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence. See Ambani VS R (1990) KLR, 161."

54. As regards the legality of the sentence, the Supreme Court having held in the case of Francis Karioko & another vs Republic (supra) that in an offence of murder a court is at liberty to impose any sentence,

with the death sentence being the maximum, there is no question that the sentence imposed is lawful. In short, the Court held that, where an accused is convicted for the offence of murder, death sentence is not a minimum mandatory penalty as currently spelt out in section 204 of the Penal Code. So then, was the sentence of 35 years imprisonment excessive?

55. The appellant, through his counsel urged us to set aside the 35 years imprisonment and substitute therefor a more lenient sentence of between 10 and 15 years imprisonment. Buttressing this request, counsel submitted in mitigation that the appellant was a first offender who was only 20 years old at the time of the incident and 25 years old at the time of sentencing, and that the sentence was harsh and excessive given the life expectancy of a male adult.

56. On our part, and whilst considering these to be valid mitigating factors, we also take into account that this is a case where, in as much as the deceased met his death in the most brutal fashion, the common intention that lead to the deceased's murder can be compared to an incidence of mob justice, yet only one of the people involved will shoulder the responsibility for others, as the appellant in the instant case. And so, matching the sentence with the extent of blameworthiness of an accused person is critical whilst imposing the sentence.

57. In view of the foregoing, we think that the appellant ought to be accorded an opportunity to reform, rehabilitation being one of the objectives of sentencing under the Judiciary Sentencing Policy Guidelines, 2023, and as a consequence, we find for the appellant on this limb.

58. In the end, this appeal fails on conviction, but succeeds as regards the sentence. We hereby affirm the judgment of the learned Judge (R. Nyakundi, J.) dated 31st March 2022, save that we set aside the 35 years jailterm and substitute for 15 years imprisonment.

59. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF FEBRUARY, 2025.

A.K MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA, CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR