Michubu alias Isaac Nkunja & 2 others v Republic (Criminal Appeal 99A of 2017) [2025] KECA 129 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 129 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 99A OF 2017

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

FEBRUARY 7, 2025

BETWEEN

JACOB MICHUBU ALIAS ISAAC NKUNJA ..... 1ST APPELLANT

JULIUS M'KAIRIBIA ..... 2ND APPELLANT

ISAAC KITHAKA ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Meru (J.A. Makau, J.) dated 18th November 2015 in H.C.CR.C. No. 77 of 2012))

JUDGMENT

1. The appellants, Jacob Michubu alias Isaac Nkunja, Julius M'Kairibia and Isaac Kithaka were charged with another with the offence of murder contrary to section 203 and section 204 of the Penal Code. The particulars of the offence were that, on 30th March 2009 at Rwongone village, Mbwetha sub location, Kilimambio Location, Igembe District within Eastern Province they jointly murdered James Murungi (the deceased). They pleaded not guilty to the charge and the case proceeded to trial where the prosecution called five (5) witnesses. On their part, the appellants testified on oath and called four witnesses.

2. As a first appellate court, we are required to re-analyse, re-appraise and critically re-assess the entire evidence adduced before the trial court and arrive at our own independent conclusions. This we must do while keeping in mind the fact that we neither saw nor heard the witnesses as they testified and give allowance to that. See Kiilu & Another v Republic [2005] 1 KLR. To that end, it is necessary to recapitulate the evidence as presented before the trial court.

3. PW1, Stanley Mbae Athendi (Stanley), testified that on 30th March 2009 he was at his home when his brother Harrison Kaume and Francis Gitonga went home pushing a bicycle on which they carried James Murungi (deceased). James Murungi was so injured that one of them was holding him while the other was pushing the bicycle.

4. Stanley enquired from Kaume why they were pushing James on the bicycle and he was told that he had been beaten. They decided to keep him overnight and take him to hospital the next day. They took him to the Maua Hospital the following day where he was treated as an outpatient and he was allowed to go home. Unfortunately, James died the following day on the night of 31st March 2009. The matter was reported to the police who collected the body and took it to Maua Methodist Hospital Mortuary.

5. PW2, Francis Gitonga, testified that on 30th March 2009 he was on his way home at 6:30 p.m. when he heard someone he knew screaming. He proceeded to the scene where he found Isaiah Kithaka; Ntonjira alias M'Kairibia; Nkunja alias Kachanja and Kinyua M'Kairibia beating a person who was lying on the ground with his hands tied on his back. He identified the person being beaten as James Murungi.

6. He stated that three of the assailants had sticks and one had a hammer and they were all beating the deceased all over his body. He testified that he warned them to stop beating him but they did not heed his warning but instead continued the beating.

7. He testified that Harrison Kaume, the deceased's brother came to the scene picked a stone and threatened to hit the assailants and they all left. He stated that he together with Harrison borrowed a bicycle and took James Murungi to his home, a distance of about 1 kilometre away and that he later left for his home only to receive information that James Murungi died the following day. He testified that the deceased was his brother-in-law as he was married to his sister. He testified that the assailants were not his relatives save for Isaiah Kithaka whose mother is his cousin and that he has no grudge against any of them.

8. PW3, Severina Karamu Douglas testified that she is a hotelier at Kaaria. She recalled on 30th March 2009 at around 3.00 p.m. that Isaiah Kithaka, Nkunja Gachanga and Ntonjira and Kinyua went to her hotel. That Kinyua entered into the hotel leaving the others near the door and on seeing James Murungi he announced that the person they were searching for was there. She stated that the other three joined Kinyua and forcefully took James Murungi outside the hotel and Kinyua went to the nearby shop for a rope which he used to tie the deceased's hands and they started beating him with sticks and a hammer all over the body.

9. She asked them why they were beating James and they told her to leave them alone. She stated that the four left with James and she returned to her hotel. She stated that the following day she received information that the four had beaten James until he died. She stated that she had known James Murungi as a customer and that the four people she had mentioned were known to her before the incident and she has no grudge against any of them.

10. PW4, Dr. Njeru Charles Muchangi, testified that he worked at Nyambere District Hospital between 2008 - 2014. He stated that he carried out a post-mortem examination on the body of one James Murungi Ngunjiri on 8th April 2009 at Maua Methodist Hospital Mortuary. He found the deceased had a deep cut on the scalp, parietal region; a bruise near the eye and ear; multiple bruises on his chest; 6th rib fractured; multiple bruises on both upper and lower ribs with no fracture; scrotum bruised; testes swollen, internal injuries were that there was blood and air in the chest cavity. The right lung had collapsed due to pressure of the blood and air. The other systems were normal. He formed the opinion that the cause of death was severe chest injury due to secondary right lung collapse resulting from air and blood found in the chest cavity. He said there was history of the deceased having been attacked and

the injuries were possibly from the attack. He testified that the deceased died within 24 hours from the time of the attack and that the weapons used were both sharp and blunt.

11. PW5, NO. 58585 PC Benedict Kaloki Muli, the Investigating Officer testified that on 31st March 2009 while he was on duty at Maua Police Station one James Murungi (deceased) reported to him and PC Kamene as having been assaulted on 30th March 2009. He stated that the deceased was then referred to Maua Methodist Hospital for treatment and that on 1st April 2009 he received a report of the death of James Murungi at his home and that he and other police officers visited the deceased's home and had the body transferred to Maua Methodist Hospital Mortuary where the post-mortem was carried out on the deceased's body on 8th April 2009.

12. He testified that as a result of his investigations he established that the deceased was a guard at a Miraa Shamba owned by the four accused persons who were accusing the deceased of having sold miraa from the shamba and failed to release the proceeds to them which caused them to attack the deceased. He testified that the deceased mentioned his assailants by their names and further that the four accused persons were mentioned by the witnesses.

13. When placed on their defence, the appellants testified on oath and called one witness each. On his part, the 1st appellant testified that on 30th March 2009 he was at Kiengu Market selling clothes with his brother from 6:00 a.m. to 6:00 p.m. He said that he was with Joseph Magete and he spent the night at the said market. He testified that he knew James Murungi (deceased) but that he did not know anything about the cause of his death though the deceased knew the people who assaulted him before his death. He stated that PW2 lied when he stated that he saw him amongst the persons who attacked the deceased. He further stated that PW3 had grudge against him because his brother had stolen miraa belonging to Kasisi Gitonga in 2004. He stated that PW5 lied because when the deceased reported to the police, he stated he was assaulted by people he knew very well giving names of Ntonjira and Kinyua and after his death witnesses were called who gave different names. He stated he was framed with the offence. He concluded his defence by stating he is not related to the 2nd, the 3rd and the 4th accused.

14. His witness, Josiah Ngota Magete stated that he was the appellant's business partner. That on 30th March 2009 they were selling clothes at the said market from 8:00 a.m. to 6:30 p.m. after which they proceeded to do the day's accounts. He testified that the appellant was not involved in the murder of the deceased as he was with him the whole day. He further stated that when he saw the appellant after his arrest, the appellant had told him he was arrested for refusing to support his wife and children and as a result some people said he had killed someone.

15. Julius, the 2nd appellant testified that on 30th March 2009 he was very sick and he called Julius Mwithane (DW4) to take him to Meru Level 5 hospital where he was attended to and given medication and released to go home. He testified that he returned to Maua at 6:00 p.m. and found a house where he spent the night. That the following day he and Julius Muthane left for their homes. He denied being involved in the deceased's death and stated that he did not know the deceased.

16. He testified that though PW2 mentioned him he lied as he was in Meru the whole day, he stated that he had no grudge with PW2 but regarding PW3 who mentioned him he stated she did so as they were not in good terms as he had his hand cut by her brother one Paul who was a thief and had reported him to the police and that Paul had later been shot by the police in August 2008. He testified that he did not know how the deceased met his death.

17. Julius Mwithali M'Thethea testified as a witness for Julius. He stated that on 30th March 2009 he was with Julius at his home at Kenichia Gichunge when Julius who was unwell asked him to take him to the hospital. That they left at around 7:00 a.m. for Meru Level 5 Hospital as Julius was suffering from

Malaria and Typhoid. He stated that at the hospital Julius was given a letter to get medicine and after treatment they went to Maua Town where they spent the night as they missed transport home and the next day in the morning, they each went to their respective homes.

18. Isaiah, the 3rd appellant testified that he was not an accused person in the matter and produced his National Identity Card as exhibit D3 bearing the names Isaiah Kithaka Murungi. He stated though he was the 3rd accused in the criminal case his name was not amongst the accused persons. He added that he was not Isaac Kithaka and that he did not know that person. He stated that on 30th March 2009 he was arrested and put in cells for 18 days without any charge which was contrary to *the Constitution*. That he was later taken to Meru High Court and charged with HCCRC 53 of 2009 and HCCR 58 of 2009.

19. He further testified that on 30th March 2009 he was at his home from morning up to 1:00 p.m. when he left for a meeting from 2:00 p.m. at Karuri Primary School for a school parent meeting which ended at 5:00 p.m. That after the meeting he left with the school chairman to see his sick wife who was a school teacher.

20. He stated that he and the school chairman stayed at his home up to 8:00 p.m. when he left for his home. That after 2 months PW1, PW2 and PW3 in the company of an AP found him at Atheru Gaiti market and had him arrested. That he was taken to Maua Police Station where he was informed that he was alleged to have murdered the deceased whom he knew, an allegation that he denied.

21. He testified that PW2 and PW3 who mentioned him lied because of the variance of timing between 6:00 p.m. and 7:00 p.m. and for their failure to explain where they were coming from. Further, he stated that he was framed by PW2 as they had fought over his money which he had stolen from the water project and that PW2 conspired with PW 3 to frame him.

22. Douglas Gitonga testified as a witness for Isaiah, he described him as a parent at Karuru Primary School. He stated that on 30th March 2009 there was a big ceremony at Karuru Primary School for PTA and that he was the school chairman. He stated that the ceremony ended at 5:00 pm after which he and Isaiah proceeded to Isaiah's home to see his wife whereby, he stayed with them up to 8:00 p.m. and left for his home. He stated that after 2 months he heard of Isaiah's arrest and charging over the offence. He denied the involvement of Isaiah over the deceased's murder as he was with him from 2:00 p.m. up to 8:00 p.m. on 30th March 2009.

23. Upon considering the evidence, the trial Judge convicted the appellants of the offence of murder and sentenced them to death.

24. Aggrieved by the conviction and sentence, the appellants filed separate memoranda of appeal to this Court. The grounds raised by the appellants are basically similar. They include grounds that the conviction was against the weight of evidence; that the prosecution failed to prove its case to the required standard; that the prosecution case was riddled with contradictions and inconsistencies and that the learned Judge erred in law and in fact in convicting based on such evidence; that the learned Judge was selective in the manner in which he analysed the evidence; that the learned Judge erred in law and in fact in rejecting the alibi defence of Isaac Kithaka; and that the sentence was harsh and excessive.

25. The appellants and the respondent filed written submissions and, when the appeal came up for hearing on a virtual platform, learned counsel Ms. Mutegi appeared for the 1st appellant, Ms. Nelima appeared for the 2nd and 3rd appellants while learned prosecution counsel Ms. Nandwa appeared for the State. All counsel sought to rely on the written submissions in their entirety.

26. Mrs. Mutegi argued that the 1st appellant's right to life was violated, citing that the mandatory death sentence for murder under the Penal Code conflicts with *the Constitution*, which outlaws such

sentences. She also contended that the 1st appellant was denied justice since the death sentence is deemed unconstitutional, thereby depriving him of a fair hearing contrary to his right to Access to Justice under Article 48 of *the Constitution*.

27. Counsel claimed that the prosecution did not summon certain key witnesses whose statements might have helped the court make a proper determination. Reliance was placed on John Kinyua Nathan v Republic [unreported].

28. It was submitted, further, that the evidence adduced by the prosecution witnesses was uncorroborated and contradictory. Reliance was placed on Mukawa & 2 Others v Republic [1989] eKLR. Counsel deceased.

29. Counsel urged that the trial Judge ignored the 1st appellant's alibi, which was supported by DW2, asserting that he was at the market the entire day. The defence suggested that the case was fabricated due to family grudges related to Miraa theft and a shooting incident.

30. On Malice Aforethought, counsel asserted that the 1st appellant could not have had malice aforethought as he did not commit the murder. The necessary witness, Kaume Harrison, neither testified nor recorded a statement, rendering the evidence insufficient.

31. Counsel went on to submit that PW1, PW2, and PW3 disowned their statements during the trial, with PW1 stating that he did not see the 1st appellant harm the deceased. She stated that this lack of corroborated evidence was unreliable and insufficient for convicting the appellants.

32. On the issue of the Dying Declaration, it was highlighted that the deceased, at the time of death, mentioned Ntonjira and Kinyua as the perpetrators, without any mention of the 1st appellant. Counsel urged that the appeal be allowed.

33. On behalf of the 2nd and 3rd appellants, Ms. Nelima urged that there was no evidence linking the 3rd appellant to the offense, as PW1 did not mention the 3rd appellant's involvement and stated he was not present during the incident. She submitted that the evidence provided by PW2 and PW3 was contradictory, especially regarding the time and place of the incident. PW3 testified that it occurred at 3:30 p.m. outside her hotel, while PW2 stated it happened at 6:30 p.m.. This inconsistency, according to learned counsel, cast doubt on their reliability. Additionally, there was no mention of the 1st appellant's involvement.

34. Counsel urged that the deceased only mentioned two assailants, Ntonjira and Kinyua, and did not name the 3rd appellant. She maintained that this omission suggests that the 3rd appellant was not present during the incident. The deceased's alibi should have been considered by the court. Moreover, the name "Kinyua" is common, and additional identification was needed to establish that the Kinyua referred to was the appellant and not anybody else.

35. On sentence it was submitted that the same was harsh and excessive based on the holding of Francis Karioko Muruatetu and Others v R. [2017] eKLR which held that the mandatory death sentence takes away the court's discretion in sentencing. We were urged to consider the circumstances of the case especially the fact that the appellants were first offenders and also consider their mitigation and to reduce the sentence to the term already served.

36. Opposing the appeal, Ms. Nandwa on behalf of the State urged that the prosecution evidence met the required standards, with no dispute about the deceased's death. The post-mortem by Dr. Njeru Charles indicated that the cause of death was severe chest injury due to lung collapse and blood in the chest cavity.

37. In regard to the unlawful acts by appellants, counsel reiterated that PW3 testified that on March 30, 2009, around 3:00 p.m., the appellants forcibly took the deceased from her hotel, tied his hands, and assaulted him with sticks and a hammer. PW2 corroborated this, stating he saw the appellants beating the deceased around 6:30 p.m.

38. As to whether the appellants had common intention, counsel submitted that PW2 and PW3 witnessed the appellants assaulting the deceased and they were together when they went looking for him and they found him in PW3's hotel. The prosecution relied on Section 21 of the Penal Code. Reliance was made on Dickson Mwangi Munene & Another v Republic [2014] eKLR and Stephen Ariga & Another v Republic [2018] eKLR

39. On identification by recognition, it was submitted that the appellants were identified by both PW2 and PW3 as one of the persons who assaulted the deceased, that both PW2 and PW3 saw the appellants assault the deceased in broad daylight at 3:00 p.m. and 6:30 p.m. respectively and that there was enough light to identify the appellants leaving no room for error. Reliance was placed on Mamush Hibro Faja v Republic [2019] eKLR.

40. As to whether the appellants had malice aforethought, it was submitted that PW3 and PW5 testified that the deceased was employed to guard miraa on the appellant's farm and his co accused and that he had sold some of the miraa and when they found out they tied his hands and assaulted him. It was also submitted that the nature of the injuries inflicted on the deceased and the weapon used was a clear indication that the appellants had the intention to either kill or cause grievous bodily harm to the deceased, hence malice aforethought.

41. On the alibi defence, it was submitted that the evidence of PW2 and PW3 placed the appellants at the scene of crime and that the appellants raised issues which were never raised during cross examination of the prosecution witnesses, an indication that the defence was an afterthought. Reliance was placed on Victor Mwendwa Mulinge v Republic [2014] eKLR.

42. With regard to the sentence it was submitted that the appellants were sentenced to death which is lawful and appropriate taking into consideration the circumstances of the case. We were urged to dismiss the appeal and uphold both the conviction and sentence.

43. We have reconsidered the evidence outlined above, the grounds of appeal and the rival submissions by counsel. We decipher the issues falling for our consideration as:

    i. Whether the offence of murder was proved;

    ii. Whether the appellants were responsible for the murder of the deceased;

    iii. Whether the prosecution evidence was inconsistent and contradictory;

    iv. Whether the prosecution failed to call necessary witnesses;

    v. Whether the trial court disregarded the alibi defence; and

    vi. Whether the sentence was punitive, harsh and excessive.

44. In the instant case, the appellants were convicted alongside another for the offence of murder. It is necessary to note at this point that one of the appellants passed on during the pendency of this appeal, and that is why we have only 3 appellants in Court.

45. For the offence of murder to be established, the prosecution must prove three elements. First, the death of the deceased must be established; secondly, that the death of the deceased was caused by an unlawful

act or omission by the accused person(s); and finally, that the accused persons committed the unlawful act or omission with malice aforethought. See Roba Galma Wario v Republic [2015] eKLR.

46. In the instant case, the fact of the deceased's death is not in dispute.

All of the prosecution witnesses confirmed that, after he was assaulted by the appellants and their co-accused, the deceased died the following day. The post mortem revealed that the cause of death was due to severe chest injury due to secondary right lung collapse resulting from air and blood found in the chest cavity.

47. As to whether the appellants were properly identified as the persons who killed the deceased, PW2 and PW3's evidence was that they saw the appellants and another as the persons that were beating the deceased with sticks and a hammer.

48. According to PW2 and PW3 the incident took place between 3:00 p.m. and 6:30 p.m. in broad daylight when they could clearly see and identify the appellants and their co-accused. The evidence shows that the two witnesses positively identified the appellants at the scene. In view of the incident having taken place in broad daylight which circumstances were conducive for such identification, this could not have been a case of mistaken identity of the appellants. We are satisfied that the appellants were properly identified by PW2 and PW3. This ground is without merit and is, likewise, dismissed.

49. Turning to the issue as to whether malice aforethought was proved, what constitutes malice aforethought is to be found in Section 206 of the Penal Code which provides: inter alia,

> "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. "

Defining "malice aforethought" in the case of Hyam v DPP [1974] A.C the Court held, inter alia, that:

> " Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm."
>
> }Malice aforethought may be inferred from the acts of the accused person as stated in Ernest Asami Bwire Abanga alias Onyango v R (CACRA No. 32 of 1990) where the Court held:
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> " The question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased."

In effect, it is the circumstances surrounding each case that provides guidance to the court on whether an accused person had malice aforethought at the time he or she killed the deceased person.

50. In the instant appeal, the evidence was that the appellants assaulted the deceased using sticks, stones and a hammer. They tied his hands to ensure that he could not defend himself or escape to save his life. Even when implored by PW2 to stop the attack, they declined and continued until they were threatened to be hit with a stone by the deceased's brother. These circumstances clearly demonstrate the intention to cause the victim grievous harm or death. The description of the victim's injuries in the post-mortem report which corresponds to the nature of the assault supports the inference of malice aforethought.

51. On the assertion that there were inconsistencies and contradictions in the evidence of PW2 and PW3, our perusal of the record does not disclose any material discrepancies that went to the root of the evidence as alleged by the appellants, with the result that this ground is without merit and is rejected.

52. As to whether the prosecution failed to call necessary witnesses, it is trite that the general position is that the prosecution in a criminal trial should avail all necessary witnesses to prove its case and should not withhold readily available witnesses even if their evidence would be adverse to the prosecution case. That position was set out by this Court in Thomas Patrick Gilbert Cholmondeley v R [2008] eKLR in which it was held that:

> " ...the duty of a prosecutor, acting on behalf of the Republic is not to secure a conviction at all costs but to be a minister of justice, i.e. to help the court arrive at a just and fair decision in the circumstances of each case. Any public prosecutor who sees his or her duty as being to secure convictions misses the point. As ministers of justice, public prosecutors must place before the court all evidence,whether it supports his or her case or whether it weakens it and supports the case for the accused."

However, in the case of Suleiman Otieno Aziz v R [2017] eKLR, this Court expressed itself as hereunder:

> "Secondly, as propounded in Bukenya v. Uganda [1972] EA 549, the proposition that the court may draw an adverse inference from the prosecution's failure to call important and readily available witnesses arises in cases where the evidence called by the prosecution is barely adequate. In Donald Majiwa Achilwa & 2 Others v. Republic, Cr. App. No 34 of 2006, this Court explained the position thus:
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> > 'The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case."

Therefore, where there is some evidence gathered by the prosecution, but which the prosecution fails to place before the court without any reasonable justification, and the evidence adduced barely establishes the prosecution's case, the court would be entitled to draw an inference that the omitted evidence, had it been availed to the court, would have been adverse to the prosecution's case.

53. In this case, it is true that the evidence of PW2 disclosed the presence of PW1, Harrison Kaume at the scene. It is also true that the failure to call him as a witness was not explained. From PW2's evidence, it would appear that Harrison Kaume came to the scene and threatened the appellants with a stone and they left. In this case, we do not know whether any statement was taken from the said Harrison

Kaume and, therefore, we cannot state with certainty that his evidence was concealed from the court or the defence. In the absence of evidence that his statement was recorded, we are unable to ascertain how his presence at the hearing would have aided the appellants case.

54. On the other hand, if Harrison Kaume was readily available and had or had not recorded his statement, nothing prevented the appellants from calling him as their witness, or from insisting that the prosecution hands him over to the defence as their witness. Based on the above that ground must fail.

55. On the alibi defence not being considered, in his judgement, the learned Judge held that having carefully given consideration to the entire evidence adduced before him by the prosecution and the defence, he was disinclined to believe the alibi defence of the accused persons and their witnesses, to the effect that they were not at the scene of the incident where the deceased was beaten to death. The learned Judge was persuaded by the evidence of PW2 and PW3 whose identification evidence was stronger than that of the accused and their witnesses. He held that the alibi defence was choreographed defence aimed at controverting the prosecution case. In his view, the alibi defence was of poor account and susceptible to fabrication as it did not account for the accused persons' whereabouts at the time PW2 and PW3 stated they saw them at the scene of the crime. He held that the cogent and credible evidence by the prosecution fully discharged the burden of proof of beyond reasonable doubt and that the whole evidence in the matter by the appellants was aimed to provide a narrative so as to create a doubt in the mind of the Court that the deceased was killed by some other persons who were yet to be apprehended by the police.

56. We are unable to fault the learned Judge on that finding. We have reconsidered the appellants' alibi alongside the rest of the evidence. As stated earlier, the incident happened in broad daylight in a public place. The appellants were well known to the witnesses. The injuries on the deceased were well explained and attributed to the appellants. We are satisfied that the prosecution evidence displaced the appellants' alibis. This ground is thus rejected. In sum, after reconsidering the evidence adduced before the trial court in its totality along with the grounds of appeal rival submissions of counsel and the law, we find the appeal on conviction devoid of merit and dismiss it accordingly.

57. With regard to the severity of sentence, we note that in his notes on sentence, the learned Judge while taking note of the mitigation, observed that the appellants were young men, with young families to care for, but pointed out that the offence was serious and only one sentence, being the death sentence was provided in law. We acknowledge that by the time the appellants were sentenced, the case of Francis Muruatetu & Another v Republic, (supra) had not been determined. The decision in that case, which challenged the mandatory aspect of the death sentence brought a new dawn to the criminal justice system in Kenya. Though apparently restricted to sentences for murder, the Supreme Court pronounced that the death sentence in Murder cases was not mandatory, and the sentencing court has jurisdiction to impose a lesser sentence. It is in that regard that we have been called upon to exercise our discretion and reduce the sentence imposed on the appellants. The respondent urges us that even as we review the sentence, we should impose a stiff sentence given the aggravating circumstances in this case.

58. We acknowledge that murder is a serious offence. It is not lost on us that the death was a result of a vicious and brutal attack involving sticks and a hammer which the appellants were armed with. It is also clear that the attack was committed after some level of planning, where the appellants stated that they had been looking for the deceased prior to the assault where they dragged him out of a hotel, tied his hands with a rope and beat him for several hours; it was not a spontaneous explosion of blind rage; and we are in agreement with the trial Judge that the appellants knew exactly what they wanted to do; and they accomplished their mission. Having considered all these issues, we are inclined to interfere with the death sentence, which we hereby set aside and substitute therefor a prison term of thirty (30) years.

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

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR