



**Rodgers Kutosi alias Paul Kutosi Lodgers v Republic (Criminal Appeal
E020 of 2023) [2025] KECA 877 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KECA 877 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL E020 OF 2023
PO KIAGE, WK KORIR & JM NGUGI, JJA
MAY 23, 2025**

BETWEEN

RODGERS KUTOSI ALIAS PAUL KUTOSI LODGERS APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Nairobi
(Wakiaga, J.) dated 7th March, 2017 in HCCC No. 50 of 2014)*

JUDGMENT

1. The appellant and Lydia Mukimba (deceased), both of Ugandan nationality, were tea pickers and residents of Gachika village, Kiganjo Location of Gatundu South Sub-County, within Kiambu County. The two lived as husband and wife for some months in the year 2013, in a seemingly abusive relationship. According to Beatrice Nalifo (PW2), the mother of the deceased, the deceased would, from time to time leave the relationship due to the violence that was perpetrated against her by the appellant. She would, however, in a too tragically familiar tale, eventually go back upon reconciling with him. In March 2014, the deceased left the relationship, never to return, upon the appellant assaulting her by cutting her on the thigh as she tried to escape. The deceased went to her mother's house where she stayed for two (2) weeks before leaving for Gachika village, to stay with her sister, Olivia Mukindia (PW3). While staying with PW3, she met John Makoli (PW1), a neighbor, with whom she soon entered into a romantic entanglement and swiftly moved in with and they lived in the manner of husband and wife.
2. On 5th June 2014, at around 5.00pm, PW1 was at work when a new lady from their tea estate went and told him that his wife had been stabbed with a knife. On hearing the news, he proceeded to their house but he did not find the deceased. When he looked by the roadside, he saw her being held by John Napolo (PW4). PW1 drew closer to them and noticed that the deceased was covered with a lessa on her stomach. She was weak and not talking. PW4 informed him that she had been stabbed.



3. It so happened that PW4 was in his house when at around 6.30pm he heard a lady crying from a neighboring house. He ran towards the house and found the deceased lying at the door step while holding her stomach. She told him that she had been stabbed by her former husband, the appellant. The deceased's intestines were sticking out through the cut wound on her abdomen. Accompanied by PW1 and other neighbors, they took the deceased to a clinic in Gathika but they were referred to Gatundu District Hospital where they were told that the deceased had died. The deceased's body was taken to the mortuary and the matter reported to the police. PW4 testified that the following day, while they were looking for the appellant, the area chief informed them that he had given the appellant a letter to go and trace his wife, the deceased. Moses Busiku (PW8), a cousin to the appellant, recalled that on 5th June 2014, the appellant went to his house and requested that he escorts him to find his wife. PW8 told him that he would only be available from 3.00pm. The appellant went back at 4.30pm with a letter from the area chief. He told PW8 that his mother-in-law had instructed him that he could only go to her house if he had a letter from the chief. PW8 decided to accompany the appellant as he looked for his wife. They arrived in Gathika at around 6.00pm and from a distance, the appellant showed him the house that they were going to. He, however, told him to wait at some place while he proceeded to the house alone, to try and convince the deceased to return to him. PW8 waited for about 20 minutes but the appellant did not return. He decided to follow him. As he approached the house, he saw the appellant running out of the house onto the opposite direction. PW8 decided to go back to his house. The next day he was arrested while at work.
4. No. 63834 Sgt Joseph Chepkok (PW9), the Investigating Officer in the matter, testified that on 6th June 2014, while at the CID offices at Gatundu in Kiambu County, a report was received that a female adult had been killed by her friend in Gachika village, within Gatundu South District. Accompanied by his colleagues, they left for the said village where they learnt that on 5th June 2014, the deceased had been stabbed in the abdomen by the appellant, her erstwhile husband. The body was preserved at Gatundu District Hospital Mortuary where a postmortem examination was conducted. The examination revealed that she died as a result of massive loss of blood occasioned by a ruptured spleen. Meanwhile, the appellant had fled to a relative's place in Pangani, Nairobi. He narrated the matter to the relative who was a local pastor and the relative chose to escort him to Gatundu Police Station. The police retrieved from the appellant's pocket the note which the area Chief had written granting him permission to trace the deceased. He was then arrested and charged before the High Court at Nairobi with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*, Chapter 63 of the Laws of Kenya.
5. The prosecution led its evidence against the appellant, as outlined above, through nine (9) witnesses. At the close of the prosecution case, the trial court (Wakiaga, J.) found that the prosecution had established a prima facie case against the appellant and put him on his defence.
6. In his defence, the appellant gave unsworn testimony and called no witness. He confirmed having lived with the deceased as his wife but denied committing the offence. The appellant admitted that he visited the deceased's home on the material day but claimed that he did not find her. He explained that on 6th June 2014 when he returned home from work, he was informed that the area chief was looking for him. He proceeded to see the Chief who referred him to the police station. At the police station, he was interrogated and arrested, and subsequently charged in court.
7. At the end of the trial, the learned Judge found the appellant guilty as charged and convicted him. Subsequently, upon the learned Judge considering his mitigation, he sentenced him to suffer death.



8. Aggrieved by that decision, the appellant lodged the instant appeal. Although his memorandum of appeal is not on record, during the hearing, the appellant indicated that he was abandoning his appeal on conviction and pursuing the appeal on sentence only.
9. Learned counsel Mr. Kimathi appeared for the appellant while Ms. Vitsengwa, the learned prosecution counsel, appeared for the state.
10. For the appellant, Mr. Kimathi implored us to review the sentence that was meted out since the appellant was a first offender and he was remorseful. He was also a young man at the material time and thus full of emotion. Counsel contended that the appellant's discovery that the deceased was living with another man may have provoked him to commit the offence and thus, it was a mitigating circumstance in the matter. Mr. Kimathi submitted that this Court has the discretion to review the sentence based on the Supreme Court's decision in *Muruatetu & Another Vs. Republic; Katiba Institute & 5 Others (Amicus Curiae)* [2017] KESC 2 (KLR) (Muruatetu). We were also urged to bear in mind that the appellant has been in prison since 5th April 2014. Counsel proposed reduction of the sentence imposed on the appellant, to a term sentence of 12 years imprisonment.
11. We questioned Ms. Vitsengwa the learned prosecuting counsel why she was opposed to the appeal yet the impugned judgment was delivered before the Apex Court's decision in (Muruatetu). Counsel's response was that the orders and directions in Muruatetu did not invalidate the death sentence which is still a legal sentence pursuant to Article 26(3) of the *Constitution*. Moreover, that decision does not apply to the appellant since his sentence to death was already commuted to life imprisonment. Ms. Vitsengwa asserted that this Court has no jurisdiction to interfere with the sentence which was commuted to life imprisonment by the President under Article 133 of the *Constitution*. She contended that functions exercisable by the President under that provision cannot be usurped by the courts. On whether we should consider the time that the appellant spent in custody during trial, it was submitted that this only applies where an offender has been sentenced to a definite term.
12. We probed counsel whether she had any authority to show that this Court does not have jurisdiction to interfere with the sentence that was imposed, because it was ostensibly meted out by the President. Her reply was that although she did not have any authority at hand, that was the legal position. Ms. Vitsengwa submitted that should the Court be inclined to allow the appeal on sentence, then the appellant should get a term sentence of at least 40 years imprisonment, considering the nature of the crime and the manner in which it was committed.
13. In a brief reply, Mr. Kimathi asserted that sentencing is a judicial function. Further, while the *Constitution* permits the President to exercise powers of mercy, those powers had not been exercised with respect to the appellant and thus this Court has jurisdiction to interfere with the sentence that "was meted out. Counsel urged us to be mindful that the murder was not premeditated and the stabbing was once."
14. We address the question of sentence only as regards its legality since, in a second appeal, our jurisdiction is circumscribed by Section 361(1) of the *Criminal Procedure Code* and confined to matters of law only, with severity of sentence statutorily stated to be a question of fact.
15. The appellant seeks a review of the sentence that was imposed on him by the trial court, citing mitigating factors such as the fact that he was a first offender and a youth at the material time. Further, the murder was not premeditated and the stab on the deceased was a single one. He also expresses remorse for committing the offence.
16. Counsel for the State, however, contested that plea and submitted that the trial court already considered the mitigating factors before sentencing the appellant and, since the appellant's sentence to



death was commuted to life imprisonment by the President, he cannot find relief in the Apex Court's decision in *Muruatetu*. Counsel also argued, rather passionately that commutation of the sentence by the President amounted to the President meting out a sentence, which this Court cannot interfere with. She, however, was unable to cite to us any authority or law upon which such an argument is founded.

17. In the often-cited Supreme Court case of *Muruatetu* (supra), the court instructed that sentencing is a judicial function which enables the courts to exercise discretion, on principle, in an individualized case-by-case basis with a view to imposing appropriate and just sentences. The court further set out the aggravating and mitigating factors that are applicable in a re-hearing sentence following conviction on a murder charge. These factors were later restated by the Apex Court in *Muruatetu & Another Vs. Republic; Katiba Institute & 4 Others (Amicus Curiae)* [2021] KESC 31 (KLR) at paragraph 18 as follows;

- a. Age of the offender.
- b. Being a first offender.
- c. Whether the offender pleaded guilty.
- d. Character and record of the offender.
- e. Commission of the offence in response to gender-based violence.
- f. The manner in which the offence was committed on the victim.
- g. The physical and psychological effect of the offence on the victim's family.
- h. Remorsefulness of the offender.
- i. The possibility of reform and social re-adaptation of the offender.
- j. Any other factor that the court considers relevant.

18. The above factors are also reproduced in Guideline 4.8.20 of the *Sentencing Policy Guidelines, 2023*. We note that this is a case where it is apparent that gender-based violence was perpetrated against the deceased and in the long run, she was killed by the same perpetrator. We thus agree, as rightly observed by the trial court, that the conduct of the appellant called for a deterrent sentence. We further observe that, the impugned decision was made prior to the directives by the Supreme Court in *Muruatetu*. The learned Judge acknowledged this very fact in his sentencing ruling at paragraph 3 and 4 as follows;

“Section 204 of the *Penal Code*, provides that any person convicted of murder shall be sentenced to death. There has been a debate and the jury is still out, whether this then makes it mandatory for the court to pass the death sentence upon conviction for the offence of murder and whether that sentence goes against the constitutional provision at Article 26(1) – Right to life.

Since the Supreme Court has not made a pronouncement on this issue the following judgments stand as a guide on this dispute.”

19. While we are mindful of the nature of the crime that was committed in this matter, and the manner in which it was carried out, we are also cognisant that in sentencing and in the instant case, re-sentencing, as a court we are expected to consider both the aggravating and mitigating circumstances of the matter. The appellant's medical examination report on record shows that as of 12th June 2014, he was 24 years of age. Evidently, the appellant was youthful and inexperienced at the time. Evidence was also adduced



by PW8 that when he escorted the appellant to the deceased's house, the appellant was not minded to go and commit the crime but rather, he was going there to convince the deceased to come back to him. It seems that it is upon being rebuffed that he stabbed the appellant once. Thus, to an extent, the murder was not planned, although it was nonetheless reprehensible and uncalled for. Taking into consideration all the aggravating and mitigating factors in the matter, we are inclined to interfere with the sentence imposed by the learned Judge. We further note that while there was mention by both the appellant and counsel for the State that the President commuted the sentence to life imprisonment, there is nothing on record to bespeak that fact. In any event, a presidential commutation of sentence does not constrain this Court's jurisdiction to review the actual sentence imposed on a convict.

20. In the result, this appeal partly succeeds to the extent that, we set aside the sentence to death, and substitute therefor with a term of twenty-five (25) years imprisonment. By dint of section 333(2) of the Criminal Procedure Code, the sentence will run from 16th April, 2014 since the appellant has been in custody since then.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

