



**Mwaura v Republic (Criminal Appeal 52A of 2016)
[2025] KECA 827 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KECA 827 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 52A OF 2016
MA WARSAME, JM MATIVO & PM GACHOKA, JJA
MAY 9, 2025**

BETWEEN

CHARLES MWAURA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Naivasha
(C. Meoli, J.) dated 9th May 2016 in HCCRC No. 25 of 2015)*

JUDGMENT

1. Charles Mwaura, the appellant herein, was charged jointly with another with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that on 12th April 2015 at Ndunyu-Njeru trading center, North Kinangop, Nyandarua County, the appellant, jointly with others not before the court, murdered Joseph Wanjohi Muhuria.
2. The appellant and his co-accused were arraigned before the trial court and pleaded not guilty. After a full trial, C. Meoli, J. acquitted his co-accused but convicted the appellant and sentenced him to death.
3. The appellant is aggrieved by those findings. He filed his notice of appeal dated 18th May 2016. He subsequently filed undated supplementary grounds of appeal and further supplementary grounds of appeal dated 24th February 2025. He impugned the findings of the trial court on the following grounds: the evidence adduced could not sustain a conviction; the sentence meted out was harsh and excessive, and the trial court failed to consider his mitigation before sentencing him. For those reasons, the appellant prayed that in allowing his appeal, his conviction be quashed and sentence set aside. Alternatively, the appellant prayed that the death penalty commuted to him be substituted with life imprisonment or a determinate sentence not exceeding 30 years' imprisonment.



4. When the appeal was virtually heard on 25th February 2025, the appellant was present but his instructing Counsel was absent, though he had filed written submissions. Learned Counsel for the state Mr. Omutelema, appeared for the respondent. The appellant elected to proceed with his appeal despite the absence of his advocate.
5. The appeal was heard on the basis of the parties' written submissions. The appellant wholly relied on his written submissions as well as a list and bundle of authorities, all dated 24th February 2025, to submit that PW1's accomplice evidence was not corroborated by that of PW2, who was an invaluable witness. Being the key witnesses to the trial, the appellant argued that the trial court erred in finding that the appellant's conviction was safe, on account of their testimonies.
6. He continued that the aspect of malice aforethought was not proved beyond reasonable doubt basing his reasoning on the following premise: no lethal weapon was used; the appellant, within minutes of getting to the crime scene, employed his personal resources to take the injured deceased person to the police station and later to the hospital. He argued that his conduct was incompatible with one with intent to kill; he surrendered himself to the police station where he was arrested; the deceased was beaten by the mob; the deceased was found in possession of stolen timber; the appellant had not planned to kill the culprit who was unknown to him at the time he was being informed about the theft; the appellant was attempting to break the vicious cycle of poverty from his family as captured in the pre-bail report; and he was agonized when he discovered that an associate of his stole from him, and would have most likely led him to apt poverty.
7. The appellant then submitted that the sentence meted out was harsh, excessive and unjustifiable. That the court failed to consider his mitigation to the extent that he prayed for leniency, was the breadwinner of a young family, was a first offender, had been in custody since 15th April 2015, was currently 52 years of age and, had been rehabilitated. He submitted that since he was on the second half of his life expectancy, his sentence ought to be reconsidered.
8. The respondent opposed the appeal. In its written submissions, case digest and list and bundle of authorities all dated 8th February 2024, the respondent summarized the evidence at trial to contend that the evidence of PW1 and PW2 was credible, unshaken and believable. That they corroborated one another, giving an account of how the appellant was properly charged with the offence of murder. For those reasons, their evidence rightly sustained a conviction. It urged the court to uphold the analysis of the learned judge insofar as their testimonies were concerned. In any event, the appellant's conduct after the assault took place was compatible with a guilty mind.
9. The respondent further argued that PW7's report indeed affirmed that the deceased died as a result of fatally inflicted injuries. On the ingredient of malice aforethought, the respondent submitted that the same could be inferred from the appellant's vicious attack on the deceased. His utterances at the time of the assault, it continued, also pointed to ill intent. The appellant's defence, it submitted, failed to shake the evidence of the prosecution and was properly rejected. Finally, on sentencing, the respondent submitted that the sentence of death was harsh and excessive. In its stead, it proposed a sentence of imprisonment that was commensurate with the appellant's conduct during and after the fatal assault.
10. As a first appellate court, we are duty bound to reconsider, re-evaluate and re-analyze the evidence that was before the trial court, to determine whether, based on those facts, the decision of the trial court is justified. (See *Erick Onyango Ondeng' v Republic* [2014] KECA 523 (KLR)).
11. The prosecution called nine witnesses in a bid to establish that the appellant murdered the deceased person. The facts as captured in the record are as follows: PW1 David Githiga Wambui testified that on



Sunday 12th April 2015, at around 10:00 a.m., he received information from the driver of the appellant's tractor that a thief had been caught stealing the appellant's timber at his yard.

12. Upon arrival at the scene on that fateful day, PW1 recognized the thief whose alias was Kugonyoka, the deceased person. He recalled that the deceased used to work for the appellant at the yard. He asked the deceased why he had stolen the timber but did not receive any response. He was informed that the appellant had asked that the deceased be detained awaiting his arrival at the yard.
13. PW1 described the scene as follows: the deceased was seated and some pieces of timber were placed next to him. He appeared to have been assaulted but there were no visible injuries. He was seated alongside PW2 Evan Miringa Ngoda, the appellant's night watchman, that was advanced in age and the appellant's co-accused; who had worked for the appellant as a handyman for about two months before the incident. He also noticed that the stacked timber had holes, evincing that some timber had gone missing. He also observed that about five pieces of timber had been placed aside.
14. PW1 left the scene to go to his garage noting that at that time, the deceased was smoking a cigarette. He later retreated for lunch. On return, he was informed by the appellant's driver that the appellant had assaulted the deceased. This prompted PW1 to return to the crime scene, where he found the appellant, his co-accused and PW2. There was also a large crowd of about 20 people gathered at this juncture. He recognized a lady called Njoki from the crowd. He also witnessed that the deceased had been trussed on the hands with barbed wire and ropes. He was also lying down shirtless. PW1 observed that his torso was visibly swollen and he was mumbling to himself.
15. PW1 continued that the appellant ordered the deceased to stand up. He then pushed him into a water trough and flogged him with a stick and a wooden plank when he fell into the water. PW1's evidence was that they tried to intervene but the appellant told them that he had not done enough. He estimated that the appellant assaulted the deceased for about 30 minutes. The deceased was crying. The appellant demanded that the deceased take them to where the stolen timber was kept. However, the deceased could not walk and immediately fell down. At that juncture, the appellant asked PW1 to take the deceased to the police station.
16. PW1 took the appellant's car keys, dressed the deceased in his jacket, and put him into the vehicle. PW1 entered the car alongside the appellant, his co-accused and one Njuguna. They drove to the chief's camp at Ndunyu Njeru. However, the administration police refused to book him because of his condition. Instead, they were asked to report to Engineer police station but the police also refused to arrest him and advised them to take the deceased to the hospital.
17. PW1 was assisted by the appellant's co-accused in removing the deceased from the vehicle. They carried him to the ward but the deceased was declared dead on arrival. While at the hospital, the doctors took note of the motor vehicle registration, demanded for their contacts and called the OCS.
18. PW1 then left the hospital. While at the car park, he noticed that the appellant had left in his vehicle, together with Njuguna whom they had left inside the vehicle. On calling the appellant, PW1's evidence was that the appellant told him to meet them ahead. When asked about the state of the deceased, PW1 told the appellant that he had passed on. The appellant urged them not to tell anyone about what had transpired.
19. On the way back to the yard, the appellant alighted while the rest were asked to go to the yard and leave the motor vehicle there. The appellant urged PW1 to take Kshs. 1,000.00 in exchange for his silence. At 9:00 p.m., the appellant's co-accused requested for Kshs. 300.00 from PW1 who gave him.
20. Disturbed by the trail of events, PW1 called PW3 and informed her that the deceased had been assaulted and was in the hospital. He did not disclose to her that he had died. The following day, PW1 was



- arrested and escorted to the police station. Upon recording his statement, he was released. PW1 recalled that the appellant called him that day at noon, asking him why he allowed the theft to happen.
21. PW2's evidence was that on 12th April 2015, he was working as a watchman for the appellant in the night shift. He had been working for about a fortnight. He gave a detailed description of the yard. After ending his shift from the previous night, he went back home. On that fateful morning at around 10:30 a.m., a man asked him why he had allowed theft to occur at the yard belonging to his boss. Alarmed, PW2 went to the scene.
 22. On arrival, PW2 saw the deceased seated, having been identified as the suspect. He was being guarded by the appellant's co-accused. The deceased had been questioned by several members of the public. There were a few other workers present. Since PW2 had worked for only two weeks, and did not live in that area, he could not recognize any of the people present. The appellant then arrived at the scene at about noon. PW2 testified that the appellant removed his coat, placing it in his office. He said: "These are the persons who have given me losses"; All the while pointing at the deceased person.
 23. Thereafter, PW2 saw the appellant slap and hit the deceased with his fists. He then picked up a wooden plank and clobbered the deceased person. Women who were in the crowd pleaded with the appellant to take the deceased to the police station, instead of assaulting him. One was heard saying, "Baba... please do not beat him. Take him to the chief." Unrelenting, the appellant retorted: "I will kill him." PW2 also pleaded with the appellant not to beat the deceased.
 24. The appellant then removed the deceased's shirt and continued to hit him with the timber. He also removed the deceased's trousers and assaulted him. The deceased was then hand-tied using barbed wire. The appellant then asked the men to throw the deceased into the water trough. Forcing his head down, the appellant continued to beat him.
 25. PW2 noticed that the deceased was bleeding from his mouth and ears. The appellant then ordered men to untie the deceased and dress him up in his apparel. He was then thrown in the appellant's lorry together with two pieces of timber. The appellant, together with the men, then left the scene in that lorry. Some people dispersed while others followed the appellant. He recalled that the first time he saw the deceased, he had not been assaulted. He was only assaulted by the appellant.
 26. PW3 testified that on that fateful day, the deceased, identified as Joseph Wanjohi, informed her that he had gone to demand his unpaid dues from his employer, the appellant, after he had been sacked. He had worked for the appellant as a tractor driver and lumberjack for two years.
 27. At around 4:00 p.m., PW1 and his friend informed her that the deceased had been assaulted by the appellant and was in Engineer District Hospital. PW1 told her that he had driven the appellant's lorry that ferried the deceased to the hospital and was in an egregious state but had previously passed by the police station. She knew PW1 as she had seen him drive the appellant's lorry. PW3 broke the news to her father PW4 Mahuria Wachira, and brother PW5 John Wachira Mahuria.
 28. The next day, PW3's husband went to Engineer police station.
On her way to the hospital, PW3 was asked by her husband to go back home and await feedback. That was when she was notified that the deceased had died the previous night and was preserved at the Naivasha mortuary.
 29. PW3 eventually went to the police station and recorded her statement. Her father and husband identified the deceased body. She further recalled having done an interview at Inooro radio station concerning the incident.



30. PW4 confirmed that PW3 informed him about the deceased's assault. He affirmed that PW3 and the deceased were his children. The next morning, he traveled to Ndunyu and headed to Engineer police station together with his son PW5. It was here that they were informed that the deceased's employer, who had initially taken him to the police station, was directed to take the deceased to a health facility. He was however pronounced dead. He confirmed that the deceased was a lumberjack and truck driver but did not know his employer.
31. PW5 confirmed that his sister, PW3 informed their father, PW4 that their brother, the deceased, had been assaulted in Ndunyu and was in critical condition. He was notified by his father on 12th April 2015 at around 7:15 p.m. He accompanied his father to travel and went to Engineer police station. They were notified that the body was preserved at Naivasha Mortuary. PW5 identified his brother's body at the autopsy exercise, noticing injuries and that it was covered with dust.
32. PW6 Moses Nganga Kimemia testified that as a bodaboda operator, on 12th April 2015, the appellant called him at 11:00 a.m. and asked him to pick him up from Mbekenya and drop him at Ndunyu centre. He proceeded to do so and completed the task within thirty minutes leaving the appellant near his yard by the roadside.
33. PW7 PC Peterson Njue testified as the scenes of crimes person.
On 17th May 2015, PW7 took nine photographs of the crime scene showing the timber yard and office overview, gate to the timber yard and a water trough, stacking area for timber, office at the yard, office close up, trough of water, close up view of trough of water, close up view of piece of wood near the water trough and two pieces of wood at Engineer police station. The photographs were marked for identification as exhibit 2A-I – I and the certificate was marked exhibit 3. He confirmed that the scene had not been preserved as the yard continued with its operations.
34. PW8 CIP Paul Kipkorir testified that on 12th April 2015 at around 3:00 p.m., he received a call from the police station that a victim had been ferried there on allegations of theft. He ordered that the victim be taken to the hospital. He later learnt that the victim had passed on. He was accompanied by PC Odonyo and viewed the body at the hospital. He observed that it had visible injuries. The body was later transferred to the mortuary.
35. On 14th April 2015, PW8 visited the scene. He saw a timber yard with an office. Adjacent to it was a house under construction. He also saw a water trough with water about two feet high. The water trough was roughly four feet high in height. PW8 conducted his investigations, interrogated witnesses and recorded witness statements. He then interviewed the accused persons who were arrested and later charged. The piece of timber purported to have been stolen was produced in court and marked exhibit 1.
36. Dr. Titus Ngulungu, the government pathologist working at Nakuru Provincial General Hospital, conducted the autopsy of the deceased on 20th April 2015. He was identified by John Mwangi Maina and John Wachira Mwaura. On general observations, he noticed that the body had multiple bruises of different shapes and sizes: irregular, linear and circular, distributed globally over the head, mostly on the left side. His upper limbs had linear injuries. His chest and lower limbs were grazed and had abrasions. Internally, he suffered incidental adhesions between his lungs, probably caused by TB. He suffered a hematoma between his scalp and bone over the head. In his nervous system, he suffered a massive hematoma and increased intracranial pressure. The cause of death was determined as severe head injury subdural hematoma and raised intracranial pressure due to multiple injuries to the head. The postmortem report was produced and marked exhibit 4.



37. After considering the evidence of the prosecution, the trial judge formed the opinion that a prima facie case had been established as to place the appellant on his defence. His sworn testimony was that on 12th April 2015, he received a call from an unknown caller at 10:00 a.m. that a thief had been apprehended while stealing his timber at his yard. He called a bodaboda rider who picked him up an hour later and proceeded to the yard.
38. The appellant arrived at the scene at 11:30 a.m. where he found a large crowd. PW1 pointed at the deceased who stood accused of theft. The deceased was unknown to him. His evidence was that the deceased appeared to have been assaulted. He called his co-accused stating that he wanted to ferry the deceased to the Administrative police post. The appellant took the deceased in his lorry to the police post but they were advised to go to Engineer police station. He also carried with him two pieces of timber that had been stolen. He was accompanied by his co-accused, PW2 and Njuguna, who was a mechanic. The incident was reported at that police station.
39. While at the police station, the appellant testified that they were advised to take the deceased to the hospital. His evidence was that the appellant was admitted at Nyayo Ward Hospital, after which they left. The following day, the OCS called him, informing him that the deceased had passed on and summoned him to the police station to record a statement. However, he stated that he was unable to do so immediately as he had travelled to Olkalou.
40. The appellant then went to the police station on 15th April 2015 where he was detained. He was charged two weeks later. He denied committing the offence, refuting that he had assaulted the deceased. He maintained that he had been framed by the witness who operated a rival timber business. He stated that was why PW1 took up the role of reporting the incident, having been incited. He recalled that he had a good relationship with PW1, who had also helped him offload timber the previous night. Occasionally, he gave him odd jobs. He added that he did not see PW2 at the scene.
41. In this appeal, the gravamen revolves around whether the trial judge arrived at an erroneous decision in finding that the appellant committed the offence with which he was charged. The essential constituents that the prosecution must establish to secure a conviction are as follows: the death of the deceased, the act or omission causing the death was unlawful, the act or omission was committed by the perpetrator and malice aforethought.
42. On the first limb, that is the deceased's death, Dr. Titus Ngulungu confirmed that the deceased's autopsy was done immediately after his death. PW1, PW3, PW4, PW5, PW8, as well as the appellant, all confirmed that the deceased passed on. On whether the death of the deceased was caused by an unlawful act, the autopsy report captured that on general observations, the deceased's body had multiple bruises of different shapes and sizes: irregular, linear and circular, distributed globally over the head, mostly on the left side. His upper limbs had linear injuries. His chest and lower limbs were grazed and had abrasions. Internally, he suffered incidental adhesions between his lungs, probably caused by TB. He suffered a hematoma between his scalp and bone over the head. In his nervous system, he suffered a massive hematoma and increased intracranial pressure. The cause of death was determined as severe head injury, subdural hematoma and raised intracranial pressure due to multiple injuries to the head.
43. All the witnesses, including the appellant, confirmed that the deceased had been clobbered. He stood accused of stealing the appellant's timber. Upon being caught, the deceased person was beaten for committing the offence of theft. That evidence, coupled with the pathologist's report, all point to the commission of an unlawful act. It is those injuries that were inflicted upon the deceased that led to his fatal demise.



44. While the death of the deceased was caused by an unlawful act, the question is whether it was caused by the appellant. As rightly established by the trial court, the evidence of PW1 and PW2 became the focal point as they were the sole eyewitnesses in favor of the prosecution's evidence. Though the appellant also stated that he was locus in quo, his evidence was that he neither witnessed the deceased being assaulted nor did he participate in the activity. All he stated was that he found that the deceased had been assaulted and, as a Samaritan, took the necessary steps to have the deceased receive treatment.
45. PW1's presence at the scene was confirmed by him and the appellant, while PW1 testified that PW2 was also at the scene. Though PW2 testified that he only saw the appellant assault the deceased, PW1 and the appellant testified that the deceased appeared to have been assaulted when he saw him for the first time. The trial court thus rightly stated that indeed there may have been several afflicters of the deceased's fatal injuries. That was probably what informed the drafters of the charge to state that the appellant, with others not before the court, murdered the deceased.
46. However, the evidence of PW1 and PW2 cannot be wished away in terms of the role the appellant played. It was testified that on his arrival at his yard at around noon, a large crowd had gathered. PW2 testified that the appellant removed his coat, placing it in his office said: "These are the persons who have given me losses," pointing at the deceased person.
47. The deceased had been trussed on the hands with barbed wire and ropes. He was also lying down, shirtless and was mumbling. They both saw the deceased pushed into a water trough and repeatedly flogged by the appellant with a wooden plank when he fell into the water. The deceased's head had been forced down into the water as he was assaulted repeatedly by the appellant. PW2 added that some men assisted the appellant in holding the deceased person while he was being beaten.
48. PW1's evidence was that they tried to intervene, but the appellant told them that he had not done enough. PW2 overheard a lady saying: "Baba... please do not beat him. Take him to the chief." Unrelenting, the appellant retorted: "I will kill him."
49. The thirty-minute assault left the deceased weak, unable to walk, in tears and bleeding from his mouth and ears. At some point, the appellant removed the deceased's clothes and hit him. Thereafter, the appellant, accompanied by PW1, his co-accused and Njuguna, took the deceased to the hospital.
50. Though the appellant tried to dislodge the evidence of PW1 by stating that he had framed him out of business rivalry, the trial court meticulously analyzed PW1's evidence before the appellant assaulted the deceased. She also took into account PW1's relationship with the appellant, who affirmatively confirmed it as good. The court concluded thus:

“ 16. The foregoing, and PW1's subsequent participation in taking the deceased to the police suggests to the court that, the witness, like may (sic) ordinary people in this country could have participated, in the very least in the initial subjugation of the suspect; and that he did not, as he claims, merely question the deceased before going away. His subsequent night report to the deceased's sister PW3, must have arisen from a guilty conscience, or self-serving on PW1's part, but I do not think that much can be made out of his alleged failure to report to the police on 12/4/15 that the deceased had died or that the 1st accused was responsible for his death.

17. It appears that up on his arrival the 1st accused person took over the matter of the alleged suspect and he got the witness (PW1) and others to assist him make a report. Hence, on the material before me I am convinced that PW1 was an



accomplice of sorts to the offence. Notwithstanding the fact that under section 141 of the *Evidence Act* an accomplice is a competent witness whose evidence can form the basis of a conviction, it is good practice to seek for corroboration of accomplice evidence...”

20. I have reviewed the evidence of PW1 in the context of the evidence in the trial, including that by the accused. I have also noted that during the rather lengthy cross-examination PW1 acquitted (sic) himself well on the key issues. He was clearly an odd jobs man and cannot be said to have any business rivalry with the 1st accused; and no suggestion was put to him.
 21. I had also opportunity to watch him testify. I believe that PW1 was a credible witness in so far as the assault by the 1st accused on the deceased is concerned.” (underline ours)
51. Bearing in mind that as the first appellate Court, we are reminded to take into account that we neither saw nor heard the witnesses, we ought to extensively consider the analysis of the learned judge. We find no reason to disturb those findings as the trial judge indeed anxiously and laboriously considered the evidence and the demeanor of this particular witness.
 52. It is also true that by and large, PW2’s evidence corroborated PW1’s evidence to the extent that the appellant indeed injured the deceased person, though he may not have been the only contributor to the offence. Additionally, as rightly stated by the trial court, though the appellant did not see PW2 at the yard on that fateful day, it does not mean that his presence ought to be discounted.
 53. It is instructive to note that the deceased died on the same day of his assault, as stated in the autopsy report. This thereby challenges the appellant’s rebuttal that he died the following day. The evidence of death on that day is also corroborated by PW1. The post-mortem report confirmed that he succumbed to injuries sustained to his head. We also conclude that the evidence of PW1 and PW2 was unshaken, credible and proved beyond reasonable doubt that the appellant occasioned fatal injuries to the deceased person.
 54. Did the appellant possess malice aforethought? Section 206 of the *Penal Code* defines malice aforethought as follows:
 - a) An intention to cause death or to do grievous harm to any person, whether such person is the person actually killed or not;
 - b. Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person 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 be caused;
 - c. An intent to commit a felony;
 - d. An intention to facilitate the escape from custody of a person who has committed a felony.”



55. Expounding further, this Court has had the advantage of enunciating itself on the discourse in the case of *Isaak Kimanthi Kanuachobi v Republic (Nyeri) Criminal Appeal No. 96 of 2007 (UR)*, when dissecting the above provision as follows:

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape, or robbery) or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought (See *Republic v Stephen Kiprotich Leting & 3 Others* [2009] e KLR HCCC No. 34 of 2008).”

56. Having confirmed that the evidence of the prosecution left no iota of doubt, we note that when the appellant walked into the yard, he said: “These are the persons who have given me losses”; all the while pointing at the deceased person. When pleaded to stop assaulting the deceased person, the appellant retorted: “I will kill him.”

57. While at the hospital, the appellant disappeared and only asked PW1 to meet him elsewhere. If his intentions were benign as he purported to suggest, the appellant would have stayed within the premises or expressed interest by following PW1 to locate the deceased and establish his condition. Withal, when he was informed that the deceased had passed on, the appellant bought PW1’s silence for a sum of Kshs. 1,000.00 asking him not to disclose what had transpired.

58. It is also evident that the appellant knew the deceased person.

This evidence is supported by PW1 and PW3. Speaking of PW3, it is also recorded that when PW1 reported the incident to PW3, he didn’t disclose that the deceased had died; an action concluded by the trial court as “on all accounts intended by the reportees to protect PW3 from the grave truth that the brother had already died, as she was to later discover.”

59. Though the appellant explained that he took the deceased to the hospital and therefore had no intention to kill, that evidence is diluted by the fact that he did not escort him to the hospital in the first instance. On the contrary, the prosecution adduced cogent evidence that the appellant only took the deceased to the hospital after the vicious assault and when it became clear that the deceased was in a terrible state and was fighting for his life. In fact, he only took the deceased to the hospital after he was ordered by the police! The appellant ignored pleas by the onlookers to stop the assault and take the deceased to the police station.

60. The above all point to a perpetrator poised with direct and constructive malice. As rightly stated by the trial court, the appellant’s actions amounted to guilty conduct inflicting serious fatal injuries upon the deceased. The severity of the attack indeed points to a direction that the appellant had every intention of murdering the deceased person.

61. Accordingly, it is our finding that in light of our above analysis, we come to the inescapable conclusion that the trial court properly convicted the appellant for the offence of murder.

62. On sentencing, the trial court condemned the appellant to the death penalty. In the case of *Sango Mohamed Sango & another v Republic* [2015] KECA 178 (KLR), this Court pronounced itself as following regarding sentencing and mitigation:



63. Similarly, the locus classicus case of our Apex Court in the case others (Amicus Curiae) [2017] KESC 2 (KLR) held:

“Pursuant to sections 216 and 329 of the *Criminal Procedure Code*, mitigation was a part of the trial process. 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. Those provisions were couched in permissive terms. However, the Court of Appeal had consistently reiterated on the need for noting down mitigating factors. Not only because they could affect the sentence but also for futuristic endeavours such as when the appeal was placed before another body for clemency.”

64. In the present case, the trial court noted the appellant’s mitigation and sentencing. It also took into account that he was a first offender. The appellant stated that he was remorseful and was 42 years of age. That he had a wife and four children, most of whom were young. After taking this into account, the trial court stated that only one sentence was provided for his offence. He was then given the death penalty as authorized by law.

65. It is common knowledge that the mandatory nature of the death penalty was outlawed by the Supreme Court in the Muruatetu decision. However, the death sentence remains lawful and a court can invoke it, depending on the circumstances. The Court went ahead to state as follows when sentencing an accused person convicted of murder:

“Whilst *the Constitution* recognized the death penalty as being lawful, it did not provide that when a conviction for murder was recorded, only the death sentence would be imposed. Mitigation had a place in the trial process with regard to convicted persons pursuant to section 204 of the *Penal Code*. It was during mitigation, after conviction and before sentencing, that the offender's version of events could be heavy with pathos necessitating the court to consider an aspect that could have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation revealed an untold degree of brutality and callousness.”

66. Regarding the sentence, the appellant argued that the sentence that was meted out was harsh, excessive and unjustifiable. He contended that his mitigation was not considered by the trial judge. A summary of his submissions on the sentence is as follows: that he had been rehabilitated while in prison; that he was a first offender; that he was the breadwinner of a young family; that he had been in custody since 15th April 2015; and that he is currently 52 years of age, thus the sentence ought to be reconsidered to give him chance in the second half of his life expectancy.

67. We have anxiously considered this ground. No case is on all fours with another and each has to be considered in its circumstances. The appellant committed a heinous crime. The evidence shows a graphic case of how the appellant assaulted the deceased most brutally and savagely. The appellant hit the deceased with his fists and then with a piece of wood. As if that was not enough, the deceased was tied with barbed wire! The appellant then had the deceased, whose body was in a bloody state, thrown into a trough of water head down. It is hard to imagine the kind of pain the deceased was subjected to. These facts cannot be overlooked in sentencing.

68. We agree with the trial court that the facts and circumstances leading to the death of the deceased justify the sentence that was given to the appellant. In the circumstances, we find that the appeal on sentence also lacks merit and is dismissed.

DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF MAY 2025.



M. WARSAME
JUDGE OF APPEAL

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J. MATIVO
JUDGE OF APPEAL

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M. GACHOKA C.Arb, FCIArb.
JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

