**Kiragu v Republic (Criminal Appeal E122 of 2023)**
**[2025] KECA 731 (KLR) (2 May 2025) (Judgment)**

Neutral citation: [2025] KECA 731 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CRIMINAL APPEAL E122 OF 2023**

**PO KIAGE, LA ACHODE & JM NGUGI, JJA**

**MAY 2, 2025**

**BETWEEN**

**GEORGE KINYANJUI KIRAGU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against the judgment of the High Court at Nairobi (Muga Apondi J.) dated 16th December 2008 in HCCR. CASE NO. 71 OF 2006)***

## JUDGMENT

1. Police officers are rarely celebrated in this country for the work they do to keep the citizens safe. Even where they are struck down in the prime of their lives in the line of duty, they fade away quietly in to the night, leaving their families to bear the grief they leave behind. APC Gibson Mathai Mungai was one such officer.

2. The common ground in this appeal is that APC Gibson died on 9th April 2006, at Kambaa Trading Centre in Kirenga Location of Kiambu County and that his death was not due to a natural cause. The questions we seek to answer are who killed him and whether they did so with malice aforethought; although it matters not to his family whether or not there was malice aforethought, since he was dead either way.

3. A summary of the evidence tendered at the trial is necessary to give context to this appeal.

4. The background of this appeal is that on the 9th April 2006, at Kambaa Trading Centre in Kirenga Location, Kiambu District within Central Province, (we believe this was meant to be Kiambu County), Gibson Mathai Mungai was murdered. At the close of investigations, George Kinyanjui Kiragu, the appellant, was arrested and charged with his murder, contrary to section 203 as read with section 204 of the *Penal Code*. He pleaded not guilty precipitating a trial in which the prosecution called thirteen witnesses to prove its case.

5. This bizarre story began when Peter Waweru, PW1, a vegetable vendor, went to the appellant on 1st April 2006, seeking to buy carrots in bulk and negotiated a price of Kshs.2,000. On 3rd April 2006, he collected 15 bags of carrots, paid the Kshs.2,000 and left. At about 5pm, the appellant went to PW1's home and did not find him. He told the wife to tell PW1 to pay him Kshs.110,000 for the carrots. He came back a second time at 10.00pm and PW1 was still not at home. He returned at 11.00pm and PW1 offered to pay him Kshs.30,000 but he rejected the offer.

6. They then agreed to meet on 4th April 2006 for the appellant to refund the delivery and transportation costs incurred by PW1 and take his carrots back, but the appellant did not show up at the agreed place and time. Nevertheless, PW1 went ahead and transported the carrots to Githunguri market and sold them. He thereafter met the appellant at Kambaa Trading Center and tried to give him the Kshs.30,000 in the presence of 3 witnesses namely; Kibe Githinji, 'Mungwana' and 'Kaso' but the appellant refused to take the money.

7. On 5th April 2006, while PW1, PW2 and the appellant were at Kambaa Trading Centre eating meat, the appellant demanded to be paid the Kshs.110,000. He refused to pay for the meat they had consumed and left. A few minutes later he returned bearing a machete and demanded to be paid. Members of the public intervened and disarmed him. PW1 and PW2 went to report the matter at the D.O's office but while on the way, they met the appellant bearing another machete. PW1 and his companions fled in different directions with the appellant in hot pursuit of one of them. They later reported the matter to the D.O and were referred to Lari Police station.

8. 9th April 2006, was the day of infamy. Two officers from the D.O's office were assigned to accompany PW1 to resolve the impasse between PW1 and the appellant. APC Gibson was one of them. Fearing for his life, PW1 let the officers proceed alone to the trading center and went home. It was while at home that he heard gunshots and learnt from one, Wangui that the appellant had shot someone. PW1 fled to Wangui's house from where he watched the appellant enter his home in search of him. Later he evacuated his family to Limuru and only came back after the appellant was arrested.

9. Peter Kanyi Njoroge, PW2, a farmer at Kiambaa Village, is the man who was eating meat together with appellant and PWI on the material day. The appellant refused to pay for the meat demanding for his payment from PW1. The appellant left instructing the two to wait for him, only to emerge fifteen minutes later with a machete, threatening to kill PW1. Members of the public overpowered him and took the machete from him allowing PW1 and PW2 to go and report the incident at the D.O's office and at Lari Police Station.

10. Paul Mbugua Gathae PW3, a pool table operator was the eye witness who saw the police officer fall down and the appellant shoot him in the head, on the ill-fated day. The appellant shot at the second officer and chased after him and the Assistant Chief. This witness saw the appellant return to the scene and shoot the fallen officer who was on the ground a second time before turning the gun on the crowd. PW3 sustained a gunshot injury on the right hand, while an elderly bystander called George was hit by a bullet in the knee. PW3 was later treated at Kijabe Mission Hospital.

11. APC Patrick Ngunjiru, PW4, was the second officer who escaped death by the skin of his teeth on that day. He was on duty with the deceased at the D.O's office on 9th April 2006, when PW1 who had earlier filed a complaint about someone threatening to kill him came in. Armed with a Ceska Pistol each, he and the deceased accompanied the complainant to Kambaa Trading center, where they found the appellant getting a haircut. The appellant came out with his machete and the deceased calmed him down.

12. The appellant still threatened to kill PW1 if he was not paid the market price for his carrots. In the process of the Assistant Chief and the deceased trying to disarm him, and before PW4 could assist them, the appellant snatched the deceased's gun and shot PW4 in the leg. PW4 threw his gun to the deceased who had taken cover behind a truck but the appellant shot the deceased before he could react. PW4 took shelter in a nearby house and was taken to hospital by members of the public. He later learnt that his colleague had died.

13. George Kemoni Kimani PW5, a local farmer, saw a sharp machete in the hands of the appellant on the material day. He saw the Assistant Chief talking to him. A short while later he heard gunshots and saw a man lying on the ground and the appellant chasing the Assistant Chief and a police officer. The appellant was now holding a gun. The appellant doubled back to the scene and shot at the man who was already lying on the ground and also PW5 in the knee. PW5 was later treated at Kirita Health Centre.

14. Francis Mwai Wariera, PW6, was the Assistant Chief Kiambaa Sub-location. He corroborated the evidence of PW4 and explained the injuries he himself sustained while trying to disarm the appellant of the machete.

15. James Mungai Mwaura, PW7, a cousin to the deceased, visited the City Mortuary on 13th April 2006 and identified the body of the deceased for postmortem examination purposes, before it was subsequently released to the family for burial.

16. Dr. Zephania Kamau PW8, examined George Kinyanjui Kiragu on 23rd May 2006 for mental fitness. He observed that he was 27 years old, with no physical injuries and was mentally fit to stand trial. He produced the P3 form he filled in this regard in the trial as Exh.1.

17. Samuel Muthamia PW9, the Investigating Officer, visited the scene on 9th April 2006, upon receiving a shooting report. He found the two officers and the Assistant Chief having been taken to Kijabe Mission Hospital. He recovered 4 empty cartridges at the scene. The appellant had fled the scene and PW9 and other officers searched for him in Kirita forest and in his home but did not find him. The appellant was later arrested by Kamukunji Police on 11th April 2006.

18. Inspector Joseph Njuguna, PW10, formerly attached to Tigoni CID office, was at the station on 9th April 2006, when he received a call from OCS Lari Police Station, informing him of the shooting incident and that two Administrative Police officers were in hospital. He went to the scene accompanied by CPL Rono and PC Kithuka and retrieved four spent cartridges. They proceeded to Kijabe Mission Hospital where he found APC Ngunjiri and was informed that APC Mungai had died. Following a tip off from informers, the appellant was arrested on 11th April 2006.

19. PC Joseph Kirwa Yerbes, PW11, and PC Teya arrested the appellant on 11th April 2006, at Wakulima City Council Market and requested Kiambu Police to collect him.

20. PW10 was also the bearer of the bad news to Lucy Njeri Wambui, PW12, the widow of the deceased. The widow visited Kijabe Mission Hospital in the company of her brother in law, one Karegei and confirmed the demise.

21. Dr. Minda Okemu, PW13, the pathologist, conducted the autopsy on the body of the deceased on 13th April 2006. He found that the deceased had sustained two gunshot wounds. One was on the left frontal part exiting on the right occipital skull and the other was on the right upper neck exit and entry. The skull was extensively fractured with lacerated brain and brain haemorrhage. He was of the expert opinion that the cause of the death was due to gunshot wounds.

22. At the close of the prosecution case, the appellant was put on his defence, whereupon he gave a sworn statement and called no witnesses. His defence was that he has known PW1 since their childhood; that they grew up together and that he sold him carrots. Further, that on the material day two officers approached him regarding a complaint lodged against him.

23. While on their way to PW1's house the Assistant Chief held him from behind and one of the officers who was moving towards him tripped and fell on the metal sheet of the appellant's machete. Fearing for his life, the appellant fled and was later arrested at Wakulima Market for no reason. He denied shooting anybody and stated that he has never handled a gun. He asserted that it is the other police officer who shot his fellow officer. He also complained that PW1 has neither paid nor returned the carrots sold to him.

24. In a judgment delivered on 16th December 2008, Muga Apondi J, considered the evidence before him and found the appellant guilty as charged. The learned judge convicted him and sentenced him to life imprisonment.

25. Aggrieved by both the conviction and sentence, the appellant filed this appeal. He filed Amended Grounds of Appeal dated 5th November 2023. The sum of his amended grounds is that: the learned trial judge failed to consider that the Police Firearms Movement Book and Ballistics Report were not presented in court; the appellant is not a trained firearm user, PW1 did not report to any police station; the machete used to injure PW6 and the one used to threaten PW1 were not produced in court; no medical reports were presented in court; and, PW1 was using the police as a scape goat to avoid paying for the farm produce.

26. The Appellant filed a Supplementary Memorandum of Appeal dated 22nd January 2025 to bring in the additional grounds that the learned trial Judge erred in law and fact:

    i. By failing to evaluate the whole evidence of the prosecution case before arriving at a conviction.

    ii. By conducting the trial in contravention of the right to a fair trial.

    iii. By failing to observe that the ingredients of the offence were not met and the entire prosecution case was impeachable under Section 163(1) of the *Evidence Act*, thus unworthy to be relied upon.

    iv. By failing to give the appellant's defense adequate consideration and further failing to apply Section 169(1) of the *Criminal Procedure Code* while disowning the appellant's defense.

    v. By imposing upon the appellant the death sentence which is excessive and constitutes cruel, inhumane treatment.

    The appellant sought that the appeal be allowed, the conviction be quashed and death sentence set aside.

27. The firm of Messrs Sigomac Advocates filed submissions dated 22nd February, 2024 for the appellant, while Senior Assistant Director of Public Prosecution, (SADPP) M.M O'Mirera, filed submissions dated 27th February 2025 on behalf of the respondent.

28. It was submitted for the appellant that the prosecution failed to prove the elements of murder to the required standard of beyond reasonable doubt, yet the trial court proceeded to convict him and sentence him to death. Counsel referred to the case of Anthony Ndegwa Ngari v Republic [2014] eKLR, where the Court set out the three elements that the prosecution must prove beyond reasonable doubt in order to secure a conviction for the offence of murder.

29. The appellant submitted that the death and cause of death of the deceased are not in doubt and were proved. However, on whether the appellant committed the unlawful act that caused the death of the deceased, it was submitted that the appellant was a farmer and his knowledge and ability to use a gun was not proved. That there was a possibility that, in a bid to shoot the appellant, PW4 mistakenly shot the deceased.

30. It was submitted that the testimonies of PW3 and PW4 were contradictory. That whereas PW4 stated that the appellant shot him on the leg before he threw his gun to the deceased, PW3 stated that the appellant shot the deceased on the head first then shot PW4. Also that PW3 saw the appellant chase after PW4 and the Assistant Chief, while PW4 stated that the Assistant Chief ran away as he dragged himself to a nearby house. That this also contradicts the testimony of PW5 since it was impossible for PW4 to have fled to a house, if PW5 saw him running with the Assistant Chief with the appellant in hot pursuit.

31. It was urged that the appellant was neither questioned on the whereabouts of the murder weapon, nor did the prosecution actively look for it. Further, that PW3 and PW4 did not produce any evidence of treatment for the gunshot wounds.

32. Reliance was placed on the case of Erick Onyango Ondeng' v Republic [2014] eKLR, in which the Court of Appeal quoted with approval the holding of the Uganda Court of Appeal in the case of Twehangane Alfred v Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6 with respect to how contradictory evidence should be treated. It was asserted that the contradictions in the prosecution evidence, particularly with respect to the testimonies of PW3, PW4 and PW5, were grave and were not satisfactorily explained. That, therefore, they affected the substratum of the prosecution's case.

33. The appellant also contended that the prosecution failed to prove malice aforethought since the appellant had no motive to kill, having been calmed down by the Assistant Chief.

34. On sentencing, the appellant submitted that the superior court noted that his mitigation was "moving", implying that but for the law, the court would have given him an alternative sentence. He contended that the death sentence is excessive, cruel, inhumane and degrading given the circumstances that brought him into contact with the criminal justice system.

35. In rebuttal, the respondent urged that it proved its case beyond reasonable doubt in line with the standard stated in Woolmington v DPP 1935 A C 462 and Miller v Minister of Pensions 1942 A C. by Lord Denning authoritatively. The respondent urged that in convicting the appellant, the trial court adequately considered the demeanor of the prosecution witnesses to wit, PW1, PW3, PW4, PW5 and PW6. PW10 and was satisfied that they were all telling the truth.

36. The respondent argued that the identification of the appellant at the scene by PW3 was admissible, since the incident happened in broad daylight, he was about 10 meters from the scene and he knew the appellant as a local farmer. That there was also no need for holding an identification parade for PW5 to identify the appellant, since the appellant was distinctive as the only one who was armed with a machete in public and in broad daylight. In regard to PW4 it was submitted that the court should subject PW4's testimony to fresh evaluation and make its own findings.

37. On the issue of contradictions in the Prosecution evidence the respondent also relied on the case of Erick Onyango Ondeng' (supra), where the Uganda Court of Appeal case of Twehangane Alfred (supra), was cited with approval.

38. The respondent contended that it does not matter who was shot first in the circumstances of the case, since an evaluation of the testimonies of both PW3 and PW5 clearly shows that it is the appellant who grabbed the deceased's gun and used it to shoot both the deceased and PW4.

39. On whether there was malice aforethought, the respondent's submission was that the trial judge was satisfied that the appellant must have been aware, that by shooting the deceased the natural consequence was to either kill him, or to cause grievous bodily harm. The respondent relied on the case of R v Tubere S/O Ochen [1945] 12 EACA 63 where the Court set out the pre-requisites for establishing malice aforethought, and Nzuki v Republic [1993] KLR 171 where this Court specified the basis upon which malice aforethought is established.

40. The respondent urged that there is undisputed evidence from PW1, PW3, PW4, PW5 and PW6 on the appellant's intention to kill. He disclosed his intention to kill PW1 and reaffirmed that intention to the police. Moreover, the fact that the appellant went back to the scene and shot the deceased again is proof of malice aforethought.

41. On sentencing, the respondent submitted that in view of the Supreme Court landmark case on the legality of death sentence for murder cases, that is, Francis Karioko Muruatetu & Another v Republic, [2017] eKLR, the death sentence prescribed for the offence of murder contrary to Section 204 of the *Penal Code* is not mandatory.

42. As a Court of first appeal, our mandate as set out in Rule 29

(1) of the Court of Appeal Rules requires us to re-appraise the evidence and draw inferences of fact on the guilt, or otherwise of the appellant. This Court in Isaac Ng'ang'a alias Peter Ng'ang'a Kahiga v Republic, Criminal Appeal No. 272 of 2005 stated it thus:

> " In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same, but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same."

43. In our view, the main issues for consideration are whether the prosecution proved all the elements of murder beyond reasonable doubt and, if so, whether the sentence meted upon the appellant is unconstitutional.

44. The elements of murder encapsulated in Section 203 of the *Penal Code* under which the appellant was charged are set out as follows:

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

45. These elements were delineated in the Court of Appeal decision of Anthony Ndegwa Ngari (supra) as follows:

> " a) the death of the deceased occurred;
>
> b. that the accused committed the unlawful act which caused the death of deceased; and
>
> c. that the accused had malice aforethought."

46. We, therefore, analyzed the evidence to establish whether the prosecution proved all the elements of murder beyond reasonable doubt. In the case of Miller (supra), proof beyond reasonable doubt was explained as follows:

> "It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."

47. As stated earlier in this appeal, it is not in dispute that APC Gibson died on 9th April 2006, at Kambaa Trading Centre in Kirenga Location of Kiambu County and that the cause of his death was an unlawful act. This is evident from the postmortem report by Dr. Minda Okemu (PW13), the pathologist who conducted the autopsy on the body of the deceased on 13th April 2006.

48. The Pathologist found that the deceased had sustained two gunshot wounds. One was on the left frontal part exiting on the right occipital skull and the other was on the right upper neck for entry and exit. The skull was extensively fractured with lacerated brain and brain haemorrhage. In his expert opinion, he attributed the cause of death to gunshot wounds. It is therefore settled that APC Gibson died and that the cause of his death was an unlawful act.

49. Next, we consider whether it was proved that the appellant committed the unlawful act that caused APC Gibson's death. From the evidence, it is stated that it is PW1 who was the target of the appellant's wrath. PW1 testified that the appellant threatened to kill him and even went to fetch a machete to do the job. This evidence was corroborated by PW2, PW4, PW5 and PW6 who all saw the appellant armed with a sharp machete threatening to kill PW1 over a carrot deal gone sour.

50. PW 3 testified that he saw one of the two police officers who came to contain the situation fall down, whereupon the appellant shot him in the head. The appellant shot the second officer and chased him and the Assistant Chief before he returned to the scene and shot the fallen officer a second time before turning on the crowd. The testimony of PW3 was corroborated by PW5 who saw the appellant chasing the Assistant Chief and a police officer while holding a gun. He, too, saw the appellant return to the scene and shot the man who was lying on the ground. The man on the ground was APC Gibson the deceased herein.

51. The appellant's argument was that the gun said to be the murder weapon was not recovered and produced in evidence. On this, this Court stated in the case of Keino v Republic Criminal Appeal 203 of 2020 [2024] KECA 710 (KLR) that:

> "We now proceed to address the effect of the failure by the prosecution to produce the murder weapon as an exhibit. The starting point is to note that the record shows that although the panga was identified by the witnesses, it was never produced as an exhibit. This failure was, however, not fatal to the prosecution's case. As has been stated by this Court again and again, where there exists sufficient evidence for a court to believe that a certain type of weapon was used, the failure to produce the weapon is not fatal to the prosecution's case."

52. The Court in Kyalo Kalani v Republic [2013] eKLR cited with approval the earlier holding in Karani v Republic [2010] 1KLR 73 that;

> " The offence as charged could have been proved even if the dangerous weapon was not produced as an exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit."
>
> We are therefore satisfied that nothing turns on the failure to produce the gun used to kill the deceased.

53. On the contradictions and discrepancies alluded to in the Prosecution's case, it was submitted that the testimonies of PW3 and PW4 were contradictory. That whereas PW4 stated that the appellant shot him on the leg before he threw his gun to the deceased, PW3 stated that the appellant shot the deceased on the head first, then shot PW4. In rebuttal, the respondent contended that it does not matter who was shot first in the circumstances of the case, since an evaluation of the testimonies of both PW3 and PW5 clearly shows that it is the appellant who grabbed the deceased's gun and used it to shoot both the deceased and PW4.

54. We agree with the holding in the Ugandan case to which both parties referred us. This is the case of Twehangane Alfred (supra), where the Uganda Court of Appeal stated as follows:

> " With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

55. In our view, the contradictions adverted to by the appellant were minor and did not affect the crux or substance of the prosecution case. It was not of any paramountcy who was shot first between the two officers, but rather whether the appellant committed the unlawful act which snuffed out APC Gibson's life. This, we have no doubt in our minds, was proved by the prosecution evidence beyond reasonable doubt.

56. On whether the presence of malice aforethought was proved, we assessed the evidence according to the provision in Section 206 of the *Penal Code* which provides that:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:
>
> 1. 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;
> 2. 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;
> 3. an intent to commit a felony;

4. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

57. In R v Tubere (supra), the Court set out the pre-requisites for establishing malice aforethought as follows:

> " To determine whether malice aforethought has been established, to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident".

58. From the evidence of the pathologist, the deceased's skull was extensively fractured with lacerated brain and brain hemorrhage. He also had an injury on the neck with an entry and an exit. His expert opinion was that the cause of the death was due to these gunshot wounds.

59. In view of the kind of injuries the appellant inflicted, we find that there was intention to cause death, or at least, to cause grievous bodily harm. He must have known that death or grievous bodily harm would result from his acts but he went ahead to commit them. He had no lawful excuse to commit them since there is no evidence that his life was in danger, and it would not matter whether he desired those results to ensue or not. By going back to the scene and shooting the deceased in the head, the appellant laid bare his intention to kill him. We therefore, infer malice aforethought from the appellant's unlawful acts.

60. As for what weight was to be given to the appellant's defence, the Supreme Court of Nigeria held in Ozaki & another v The

State, Case No. 130 of 1988, that for a defence to be rejected, it must be incredible and must be weighed against the Prosecution evidence. We are cognizant that all the appellant had to do was to create doubt as to the strength of the case for the prosecution, as stated in the Ugandan case of Uganda v Sebvala & others [1969] EA 204.

61. The record before us indicates that the trial judge considered the appellant's defence and found that it lacked merit. The reasoning of the trial judge on this was as follows:

> " Given the overwhelming evidence against the accused I hereby reject the defence which has no merits at all. In any event the accused was definitely economical with the truth. The upshot is that I hereby concur with the verdict of the assessor's. I hereby find that the Prosecution has proved its case beyond reasonable doubt."

We see no reasonable doubt created by the defence which might benefit the appellant. We, therefore, agree with the trial judge that the prosecution proved its case against the appellant beyond reasonable doubt.

62. On the sentence, the appellant submitted that the superior court observed that his mitigation was moving, implying that the court would have given him an alternative sentence, but for the law. He contended that the death sentence is excessive, cruel, inhumane and, degrading given the circumstances of the case. The respondent on its part conceded that in view of the Supreme Court landmark case on the legality of death sentence for murder cases, that is, Francis Karioko Muruatetu & Another v Republic, [2017] eKLR, the death sentence prescribed for the offence of murder contrary to Section 204 of the *Penal Code* is not mandatory.

63. We bear in mind that the court does not alter a sentence on appeal unless the trial judge has acted upon wrong principles, or overlooked some material factors. The Supreme Court of India in Alister Antony Pariera v State of Mahatashtra [2012] 2 SCC 648 had this to state regarding the objective of sentencing:

> "70. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

64. We are alive to the fact that whereas there are accused persons who are obviously deserving of leniency, there are others who are definitely deserving of harsh sentences due to the heinous nature of the crimes committed and should be appropriately punished.

65. While imposing the death sentence herein, the learned trial judge observed as follows:

> " Despite the moving mitigation by the able defense counsel, it is incumbent on the court to comply with the law. In view of the above the accused is hereby sentenced to death"

The learned trial judge was constrained by the mandatory nature of the death sentence prescribed in Section 204 of the *Penal Code*, which was later ruled to be unconstitutional in Muruatetu (supra), subsequent to this sentence.

66. Whereas the foregoing sentence was lawful, nonetheless, we are cognizant of the constitutional edict that was later pronounced by the Supreme Court in Muruatetu (supra), where the apex Court expressed itself thus:

> " ...If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict."

67. While Muruatetu (supra) highlights the importance of considering mitigating factors in sentencing, it does not preclude the imposition of death as a sentence. It is its mandatory nature that is abhorred. Instead, it underscores the need for substantive consideration of individual circumstances before sentencing. Courts exercise discretion on a case-by-case basis, with a view to imposing appropriate and just sentences.

68. Considering the circumstances of this case, the appellant was a young man who was treated as a first offender and whose mitigation was moving. However, the aggravating factors are the depravity with which he executed the heinous act. He demonstrated a callous disregard for the lives of the victim and other people around him, by the manner in which he mowed down the deceased, a police officer who was on duty, trying to ensure peace and security for the citizens. Without an iota of mercy, the appellant

returned and shot him in the head as he lay bleeding and helpless on the ground from the neck wound before turning the gun on other bystanders.

We are therefore, not persuaded that there is need to interfere with the sentence meted upon him. In the result, this appeal fails and is dismissed in its entirety.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MAY, 2025.**

**P. O. KIAGE**

**.....**

**JUDGE OF APPEAL**

**L. ACHODE**

**.....**

**JUDGE OF APPEAL**

**JOEL NGUGI**

**.....**

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**