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Kanyake v Republic (Criminal Appeal 48 of 2019)
[2025] KECA 1102 (KLR) (20 June 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 48 OF 2019

JM MATIVO, PM GACHOKA & WK KORIR, JJA

JUNE 20, 2025

BETWEEN

HEZEKIAH NJOROGE KANYAKE ALIAS VIATE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal against the judgment of the High Court at Nakuru (M.A. Odero, J.) dated 23rd March 2018 in HCCR No. 60 of 2012)

JUDGMENT

1. Hezekiah Njoroge Kanyake, the appellant herein, was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The information stated that on 13th July 2012 at Enasampurai area of Naivasha Municipality within Nakuru County, the appellant murdered Daniel Parseli Kiminta. The appellant pleaded not guilty, and a trial ensued, pitting the prosecution's six witnesses against the appellant's testimony. At the conclusion of the trial, the appellant was found guilty, convicted and sentenced to serve 30 years in prison.

2. He now appeals against that decision, and in the amended grounds of appeal dated 16th September 2024, the appellant contends that the trial court erred in law by convicting him and that the sentence imposed upon him was excessively high.

3. As already mentioned, the prosecution called six witnesses. Sammy Kipaski (PW1) ran a hotel called Enasampurai and was the deceased's cousin. He stated that he knew the appellant, whom they called "Vaithe". On the material day, he heard screams emanating from outside his hotel, and when he stepped out, he saw the appellant stabbing the deceased on the stomach and the neck. He also saw the deceased's open stomach with intestines protruding out. PW1 testified that the incident took place about 10 feet from his hotel and that there was an electric light and the moon was up. He stated that the appellant ran away when a crowd gathered. They looked for a vehicle which took the deceased to the police post

and later to Naivasha Hospital, where he died two days later. He identified the knife the appellant used, which was described as a mid-length knife with a metal handle. The witness stated that members of the public arrested the appellant and escorted him to the police station. It was also his evidence that the appellant and the deceased were friends and that he had seen them drink together earlier that day.

4. Benson Sururu Kiminda (PW2) was the deceased's father. On the material night, he heard people shout that the appellant had killed his son. He did not make a move until the following day, when he went to the police post and was informed that "Vaithe" had assaulted his son. He visited his son in hospital and saw stab wounds on his stomach, chest, and neck.

5. James Kiarie Ngugu (PW3) was the deceased's cousin. He identified the deceased's body for the purpose of postmortem on 20th July 2013. He also stated that he had earlier visited the deceased in the hospital, who told him that "Vaithe" had attacked him. He noted that the deceased had cut wounds on the stomach, neck, and chest.

6. APC James Njoroge (PW4) was at the material time attached to the Enasampurai AP Post. On 30th June 2012, he heard screams from the shopping center and rushed there to check what was happening, only to find the deceased lying outside a bar. He noticed he had a cut on his abdomen with intestines hanging out. At the time, the appellant had fled the scene. As they were trying to help the deceased, members of the public apprehended the appellant and surrendered him to the police. Upon searching the appellant, he recovered a blood-stained pocketknife with a metallic handle. He noticed that the appellant had bloodstains on his right hand. He also observed that the appellant and the deceased appeared drunk at the time. He placed the appellant in custody before taking the deceased to the hospital. PW4 later handed over the appellant to Kongoma Police Station.

7. PC David Ndegwa (PW5) was the investigating officer. His investigation established that on 30th June 2012, the appellant attacked the deceased over a twilight girl at the Enasampurai centre. He also testified that he received a bloodstained knife from PW4 that was recovered from the appellant. He initially preferred a charge of assault against the appellant, but when the deceased succumbed to the injuries, the charge was withdrawn, and the murder charge brought forth.

8. Dr. Titus Ngulungu (PW6) presented a postmortem report prepared by his colleague, Dr Kariuki. The postmortem was conducted on 20th July 2012. The deceased had stab wounds on the chest wall and the lateral aspect of the right lumbar region. Internally, there was a collection of pus within the abdominal cavity. There was also peritonitis due to a stab wound to the abdomen, causing perforation of the small intestine. He concluded that the cause of death was septic shock due to infection of internal organs.

9. In his defence, the appellant stated that on the material day, he worked in his farm until 1.00 pm when he went to revel until 9.00 pm. Thereafter, he proceeded to his residence to sleep. At about 2.00 am, he was arrested at his house by members of the public who accused him of stabbing a manand was escorted to the police station. The appellant denied stabbing the deceased.

10. When the appeal was called for hearing, the appellant appeared virtually from Kamiti Maximum Prison. Learned counsel Ms. Nafula, holding brief for Ms. Dache appeared for the appellant, while learned Senior Assistant Director of Public Prosecutions (SADPP) Mr. Omutelema represented the respondent. Counsel opted to rely on their respective written submissions.

11. Through the submissions dated 16th September 2024, Ms. Nafula submitted that the prosecution did not prove its case beyond reasonable doubt. She argued that the trial court erred by completely disregarding the burden placed on the prosecution and convicting the appellant based on inconclusive evidence. To buttress this submission, counsel urged that there was no direct evidence linking the appellant to the crime committed on the fateful night. According to Ms. Nafula, only PW1 testified

to have seen the appellant stab the deceased, and that it was incumbent upon the prosecution to identify other witnesses to corroborate PW1's testimony, including those purported to have arrested the appellant and dragged him back to the scene. Counsel further contended that the conditions ensuing at the time of the incident were not ideal for identification, and the trial court ought to have subjected such identification to further scrutiny. Counsel referred to *Wamunga v Republic* [1989] KLR 426 to point out the need for the court to sift through the evidence on identification and be satisfied that the circumstances of identification were favourable and free from the possibility of error before it could safely convict on the evidence.

12. Additionally, Ms. Nafula argued that since the only material evidence linking the appellant to the crime was a knife, the same ought to have been subjected to forensic analysis to establish whether it was indeed the murder weapon. She argued that because there was no forensic analysis of the knife, there was no conclusive link of the appellant to the crime.

13. Ms. Nafula also faulted the trial court for failing to consider the appellant's defence of intoxication, which is a defence provided under section 13(2)(b) of the *Penal Code*. While appreciating the narrow nature of this defence, counsel submitted that there was evidence that the appellant and the deceased were intoxicated on the fateful night and were both temporary insane as per section 13(2)(b) of the *Penal Code*. Counsel relied on *Rex v Retief* [1940-1943] EA 71 to urge that this defence was available to the appellant, hence the charge was not established against him.

14. Regarding the sentence, counsel urged that the circumstances of the offence called for a more lenient sentence as opposed to the 30 years' imprisonment imposed by the trial court. In the end, Ms. Nafula urged us to allow the appeal.

15. Learned counsel Mr. Omutelema, on his part, opposed the appeal through submissions dated 22nd August 2024. He maintained that the appeal lacks merit as the offence was proved to the required threshold. Learned counsel proceeded to rehash the evidence on record and submitted that the evidence proved each and every element of the offence of murder. Counsel cited *Anjononi & 2 Others v Republic* [1980] KLR 59 and *Maitanyi v Republic* [1986] KECA 39 (KLR) to underscore the jurisprudence and legal principles governing evidence of identification by a single witness.

    Mr. Omutelema referred to *Joseph Kariuki Ndung'u & Another v Republic* [2010] eKLR to underscore the principle that the assessment of the credibility of witnesses falls within the trial court's powers and not the appellate court. In the end, counsel urged us to dismiss the appeal in its entirety, arguing that the sentence of 30 years' imprisonment was merited.

16. In the appeal before us, the appellant challenges both the conviction and sentence by the High Court. That being the case, we are reminded of our mandate on a first appeal under section 379(1) of the *Criminal Procedure Code*, which is akin to a retrial as it involves a reconsideration of the facts and the legal principles relevant to the conviction and sentence. It is the appellant's expectation that we will conduct a thorough and fresh examination of the evidence, carefully weighing conflicting testimonies before reaching our independent conclusions. In doing so, we must remain aware that we did not have the opportunity to hear and observe the witnesses as they testified in order to gauge their demeanour, and consequently, we must give room to that fact-see *Dickson Mwangi Munene & Another v Republic* [2014] eKLR. Alive to the stated mandate, we have reviewed the record, the submissions, and the authorities cited by counsel. In our view, what arises for determination is whether the offence of murder was proved against the appellant and, if so, whether the appellant has established a basis for our interference with the sentence.

17. As was held in *Roba Galma Wario v Republic* [2015] eKLR, for the prosecution to secure a conviction in a charge of murder under section 203 as read with section 204 of the *Penal Code*, it must prove the

fact and cause of the death of the deceased, that it is the accused whose actions or omissions led to the deceased's death, and, that the accused in killing the deceased had malice aforethought. It is within the bounds of these three elements that we shall consider all the issues raised by the appellant in his submissions.

18. The fact and cause of the death of Daniel Parseli Kiminta is not disputed. Sammy Kipaski (PW1), Benson Sururu Kiminda (PW2), James Kiarie Ngugu (PW3), and PC David Ndegwa (PW5) all testified that the deceased was admitted at Naivasha Hospital with stab wounds on the abdomen, chest, and neck and that he succumbed to the injuries a few days later. James Kiarie Ngugu (PW3) is one of those who attended the postmortem and identified the body for that purpose. Dr Kariuki identified injuries concurrent with what was observed by the other witnesses and found the cause of death to be septic shock due to infection of internal organs. The postmortem report prepared by the pathologist was produced by Dr. Titus Ngulungu (PW6) as an exhibit.

19. Before we deal with the issue of whether the appellant was implicated in the events leading to the deceased's death, it is necessary to briefly discuss the time of the deceased's demise.

According to Sammy Kipaski (PW1) and Benson Sururu Kiminda (PW2), the appellant succumbed two days after the events of 30th June 2012. On the other hand, the investigating officer, PC David Ndegwa (PW5), testified that the deceased passed away on 13th July 2012. The account by the investigating officer was corroborated by the post-mortem report produced by Dr Titus Ngulungu (PW6), which indicated that the deceased died on 13th July 2012. We are therefore inclined to believe that the date of death was 13th July 2012 because PW5 and PW6 are professionals in their respective fields and are expected to be keen when recording dates, unlike PW1 and PW2. Whichever the date of the demise of the deceased, in accordance with the provisions of section 215(1) of the *Penal Code*, the death having occurred within one year and a day from the date of the assault, we find that the death of the deceased was caused by a human hand. Furthermore, the evidence on record shows that after the incident, the deceased spent the remaining days of his life in hospital.

20. The next issue is whether the appellant was linked to the injuries sustained by the deceased on 30th June 2012. Both the appellant and the deceased were known to PW1, who referred to them as close friends and drinking buddies. Even though it would appear that this was a case of recognition as opposed to identification of a stranger on the part of PW1, we are reminded of the dictum in *Cleophas Otieno Wamunga v Republic* [1989] eKLR that:

> "Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."

21. The incident, according to PW1, occurred at 10.00 pm. His evidence was that he stepped out of his hotel and saw the appellant assault the deceased about 10 feet away. He testified that the scene was lit by electric bulbs and light from the moon. The witness also noticed that the appellant was wielding a mid- length knife with a metal handle, which he used to rip the deceased's body. PW4 who was among the first responders at the scene, told the trial court that upon re-arresting the appellant, he searched him and recovered a mid-length knife with a metal handle from his pockets. He also noticed that one of his hands was blood-stained. The evidence therefore linked the appellant to the crime and the murder weapon. There is nothing on the record to show that PW1 and PW4 had any reason to tell lies against the appellant.

22. In a bid to challenge the finding that he caused the deceased the fatal injuries, the appellant, through counsel, submitted that, first, there was a failure to call critical witnesses, and second, that the knife was not subjected to forensic analysis, hence the knife could not be used to link the appellant to the crime.

23. Specific to the argument that crucial witnesses were not called to testify, counsel argued that the members of the public who initially arrested the appellant ought to have been called as witnesses. In answer to this submission, we commence by appreciating that section 143 of the *Evidence Act* provides that no particular number of witnesses is required to prove the existence of any fact. Additionally, we recognize that the prosecution is obligated to only call witnesses sufficient to prove a fact and no more, and that the discretion to decide which witnesses to call remains with the prosecution. Thus, in *Julius Kalewa Mutunga v Republic* [2006] eKLR it was held that:

> "As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive – see *Oloro s/o Daitayi & others v R.* (1950) 23 EACA 493."

24. We also associate ourselves with the views of the Court in *Omukanga v Republic* [2023] KECA 430 (KLR) that:

> "...We further point out that a party desirous that adverse inference be made owing to the failure to call certain witnesses should, as a matter of good practice, identify the various aspects of the case that, in the view of that complaining party, the uncalled witnesses would have shed more light on. It is also important for the party to establish a link between the uncalled witnesses and the set of evidence. In our view, anything short of this, would amount to mere speculation not actionable by the courts. The alleged oblique motive should be visible from the record or the evidence by itself."

25. In this case, we do not find merit in the appellant's submissions on this ground for the following reasons. First, the evidence adduced by PW1 was sufficient to put the appellant at the scene of crime. He witnessed the appellant inflicting injuries on the deceased. The appellant was also well-known to the witness. Second, the appellant has not established what aspect of the evidence was marred with uncertainty that the alleged uncalled witnesses, if they were to be called, would have shed more light on. We notice that other than the frantic call for corroboration of the evidence of PW1 and PW4, the appellant never impeached the evidence of these witnesses during cross-examination. There was no reason why the two witnesses would work in tandem to frame the appellant. Finally, the appellant also failed to establish how the evidence of the uncalled witnesses would have exonerated him from the crime. We therefore find no merit on this ground of appeal because the witnesses called placed the appellant at the scene of crime.

26. The other argument by counsel for the appellant was that the failure to subject the murder weapon to forensic analysis meant that the appellant could not be linked to the offence. On this issue, we are in agreement with the jurisprudence expressed by the Court in *Lugo v Republic* [2023] KECA 506 (KLR) as follows:

> "As regards the failure to subject the weapon, the stone to forensic examination, as appreciated by Learned Counsel for the Appellant, the offence as charged could have been proved even if the dangerous weapon was not produced as 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. Where the weapon is produced, as happened in this case, it makes the prosecution's case even stronger though it was not subjected to forensic examination. See *Karani v Republic* (2010)1 KLR 73 and *Ekai v Republic* (1981) KLR 569. In this case apart from the said stone there was evidence that the Appellant was seen physically assaulting the deceased before he hit him with a stone."

27. A similar holding was made in *Mulwa & Another v Republic* [2023] KECA 553 (KLR). Subscribing to the stated principle, we are satisfied that in this case, though the failure to subject the knife to forensic analysis was a lapse in the investigative process, it did not water down the cogent evidence adduced by the prosecution to link the appellant to the offence. We say so for the following reasons. First, PW1 witnessed the appellant stab the deceased several times on the neck, chest and abdomen using a mid-length knife with a metal handle. Second, when re-arresting the appellant, PW4 recovered from him a blood-stained mid- length knife with a metal handle and noticed that one of the appellant's hand was blood-stained. Third, PW2, PW3 and PW5 who viewed the deceased's body, all saw injuries similar to those stated by PW1 and PW4. Fourth, the findings contained in the postmortem report resonate with injuries inflicted by a knife, which both PW1 and PW4 identified at the trial as the weapon they saw and recovered on the fateful day. We are therefore satisfied that the knife produced before the trial court as an exhibit was the murder weapon used by the appellant.

28. Flowing from the foregoing analysis, we agree with the findings of the learned Judge that the appellant was not only placed at the scene of the crime but was identified as the person who inflicted the injuries that eventually ended the deceased's life.

29. The third element that the prosecution was required to establish was malice aforethought on the part of the appellant. The elements of malice aforethought are legislated in section 206 of the *Penal Code* as follows:

"(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) 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."

30. In arguing that malice aforethought was not established by the prosecution, counsel for the appellant submitted that the appellant was intoxicated at the material time. According to counsel, since there was evidence that the appellant and the deceased were drunk on the fateful night, the appellant was thus in a temporary state of insanity pursuant to section 13(2)(b) of the *Penal Code*. There was no response to the appellant's argument by the respondent on the issue of intoxication, which may be explained by the fact that the respondent's submissions are dated 22nd August 2024 and could have been filed almost a month earlier than those of the appellant, which are dated 16th September 2024. It would have been helpful to this Court had the respondent addressed this argument through supplementary submissions or orally during the hearing of the appeal.

31. A review of the record confirms that evidence was adduced to show that the appellant may have been on a drinking spree. PW1 testified that the appellant had been drinking together with the deceased earlier that day. PW4 also noticed that the appellant and the deceased were drunk at the time of the incident. The appellant in his defence also indicated that he had been drinking from 1.00 pm until 9.00 pm. The question, therefore, is whether the defence found in section 13 of the *Penal Code* was available to the appellant. The provision is couched in the following terms:

> " 13. Intoxication
>
> 1. Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
> 2. Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—
>   a. the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
>   b. the person charged was by reason of intoxication insane,temporarily or otherwise, at the time of such act or omission.
> 3. Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the *Criminal Procedure Code* (Cap. 75) relating to insanity shall apply.
> 4. Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
> 5. For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs."

32. Section 13 of the *Penal Code* has been the subject of several decisions by this Court. For instance, in *Said Karisa Kimunzu v Republic* [2007 KECA 481 (KLR), the Court, while interpreting the provision, held that:

> " The intendment of the section is clear. If it be shown in a trial for any offence that at the time the person charged committed the act or made the omission complained of, did not know, by reason of drunkenness or intoxication that such act or omission was wrong or did not know what he was doing and further that the drunkenness or intoxication was brought upon him without his consent, by the malicious or negligent act of a third party, then in such an event, though it be proved that the person charged committed the act or made the omission, yet because of the drunkenness or intoxication, he is entitled to a complete discharge. But if it be shown that the drunkenness or intoxication made him insane, temporarily or otherwise, then he is not entitled to a discharge but is only entitled

to have the provisions relating to insane persons applied to him, namely that he committed the act or made the omission but was at the time of doing so was insane.

But under subsection (4) the court is required to take into account the issue of whether the drunkenness or intoxication deprived the person charged of the ability to form the specific intention required for the commission of a particular crime. In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the *Penal Code*. If there be evidence of drunkenness or intoxication then under section 13(4) of the *Penal Code*, a trial court is required to take that into account for the purpose of determining whether the person charged was capable of forming any intention, specific or otherwise, in the absence of which he would not be guilty of the offence. In the circumstance of this appeal, the learned trial Judge was required to take into account the appellant's drinking spree of the previous night and even that morning in determining the issue of whether the appellant was capable of forming and had formed the intention to kill his son."

33. Similarly, in *Bakari Magangha Juma v Republic* [2016] KECA 162 (KLR), the Court, in distinguishing the three different forms of defences available under section 13 of the *Penal Code* held that:

"Under section 13 of the *Penal Code*, intoxication is not a general defence to a criminal offence, except in the circumstances set out in the section. A person who commits an offence while intoxicated is not ipso facto excused from the consequences of his act. In our view the section affords a defence of intoxication in three situations as follows.

The first situation is in what is called involuntary intoxication, where at the time of commission of the act complained of, the accused person does not know that it is wrong or does not know what he is doing, because of intoxication caused without his consent by the malicious or negligent act of another person. In such a case, the court is required to discharge the accused person.

The second situation is where the accused person, by reason of intoxication is insane, temporarily or otherwise, so that at the time of commission of the act complained of, he does not know that it is wrong or does not know what he is doing. This situation brings the case within the M'Naghten Rules and the court is required to deal with the accused person in the manner prescribed by the *Criminal Procedure Code* for accused persons who were insane at the time of commission of the offence, culminating in a special finding of guilty but insane and the detention of the accused person in a mental hospital at the pleasure of the President.

In *Rex v Retief* [1940-1943] EA 71, the former Court of Appeal for Eastern Africa explained this aspect of the defence of intoxication as follows:

"The insanity whether produced by drunkenness or otherwise is a defence to the crime charged. The law takes no note of the cause of insanity and, if actual insanity in fact supervenes as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. It is immaterial whether the insanity so induced was permanent or temporary and if a man's intoxication were such as to induce insanity so that he did not know the nature of his act or that his act was wrongful, his act would be excusable on the ground of insanity and the verdict should be as laid down in section 159 of the *Criminal Procedure Code* 'guilty of the act charged but insane when he did the act.' "

> The third situation, contemplated by section 13(4), arises where by reason of intoxication the accused person is incapable of forming a specific intent, which is an element of the offence charged. Sometimes this situation is refereed to as "intoxication or drunkenness negativing mens rea"....
>
> In this case, the appellant having raised the defence of intoxication and having led evidence of his state of intoxication on the material day, which was never challenged or controverted by the prosecution, the trial court was duty bound to take it into account for the purpose of determining whether the appellant was capable of forming malice aforethought, in the absence of which he could not be guilty of murder. If the trial court were to be satisfied that the appellant killed the deceased but without malice aforethought, it would have been entitled to convict him of manslaughter rather than murder. (See for example *Karisa Wara v Republic*, Cr App No. 267 of 2006; *Peter Kariuki Kaburu v Republic*, Cr App No. 234 of 2009; and *Boniface Gathege Wacheke v Republic*, Cr App No. 12 of 2010). It would have had no basis at all for finding him guilty but insane and directing his detention in a mental hospital at the pleasure of the President as the respondent contends."

34. We start by observing that although the appellant's testimony that he was intoxicated was supported by two of the prosecution witnesses, the learned Judge did not address the issue of the appellant's intoxication in her judgment. Counsel for the appellant placed reliance on section 13(2)(b) of the *Penal Code*, but there is no iota of evidence on record to show that the appellant "was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission." The next step is to consider whether, from the evidence on record, the appellant was, as a result of the intoxication, unable to form the intention to commit the offence of murder. The evidence on record established that PW1 saw the appellant drinking with the deceased. He also witnessed the two friends having a discussion outside a club. Later that evening, he witnessed the appellant stab the deceased severally on the neck, abdomen and chest despite having slit open his abdomen. PW1 further testified that when a crowd formed, the appellant took off. PW4 corroborated the evidence of PW1 that the deceased was arrested by the members of the public who had gone after him. In his defence, the appellant distanced himself from the crime and did not talk about what transpired. If he was so intoxicated that he could not understand what he was doing, the question that arises is why would he then be in the frame of mind to run away when he saw PW1? He never even admitted the obvious fact that he had been drinking with the deceased. Considering the nature of the injuries suffered by the deceased and the appellant's actions during the incident and thereafter, as described by PW1 and PW4, we are convinced that his actions were with malice aforethought. He knew what he was doing, and he cannot hide behind self-induced intoxication. Therefore, we find that even though there was evidence of intoxication, the prosecution discharged the burden of proving that the appellant was capable of forming the intent necessary to commit the offence of murder.

35. From the foregoing, we find that the appellant's conviction was safe. The prosecution proved beyond reasonable doubt that the appellant murdered Daniel Parseli Kiminta.

36. Turning to the appeal against the sentence, counsel urged that the circumstances of this case called for a lenient sentence. Ordinarily, sentence is a matter of discretion by the trial court. An appellate court must approach the issue of sentence with deference and only interfere where the sentence is manifestly excessive or where the trial court overlooked some material factor, or considered a matter it ought not

to have considered, or acted on a wrong principle. These principles were reiterated in *Bernard Kimani Gacheru v Republic* [2002] eKLR, thus:

> "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

37. In this case, we have reviewed the sentencing proceedings and note that the learned Judge took into consideration the appellant's mitigation and the period already spent in custody before sentencing him to 30 years in prison. The record speaks for itself and reveals no error on the part of the learned Judge as far as the legal principles for sentencing are concerned. We therefore have no reason for interfering with the sentence, and we therefore decline the appellant's invitation to reduce the sentence.

38. Consequently, we find the appeal to be without merit in its entirety and dismiss it. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 20TH DAY OF JUNE 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

W. KORIR

....

JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR