



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muroki v Republic (Criminal Appeal 105 of 2019)  
[2025] KECA 1105 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1105 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CRIMINAL APPEAL 105 OF 2019  
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA  
JUNE 20, 2025**

**BETWEEN**

**LUKA MWITHALIE MUROKI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal against the Judgment of the High Court at Nyeri (A. Mabeya, J.) delivered on 28th June, 2019 in H.C. CR. Case No. 21 of 2014)*

**JUDGMENT**

1. The appellant Luka Mwithalie Muroki was charged jointly with another with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* it being alleged that on 16<sup>th</sup> March, 2014 at Kaumone village in Igembe North District of Meru County they murdered Tonny Kiraithe. That other pleaded guilty to a lesser charge of manslaughter and was convicted and sentenced. The appellant before us pleaded not guilty and was subjected to a trial where the prosecution called 7 witnesses, he was put on his defence and was convicted and sentenced to 25 years imprisonment in a judgment delivered on 28<sup>th</sup> June, 2019 by Mabeya, J. He was dissatisfied with those findings and filed this appeal. Being a first appeal it is our mandate to re-appraise the evidence and reach our own conclusions of facts but always remembering that we lack the advantage of the trial Judge who saw and heard the witnesses as they testified. That mandate has been recognized by this Court in various judicial pronouncements in such cases as *Okeno vs. Republic* 1972 EA 32 where it was stated:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was



some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”

We shall revisit the case to enable us carry out the said mandate.

2. It was the middle of the night of 16<sup>th</sup> March, 2014 when Margaret Kainyu (PW1-Kainyu) was woken up by noises emanating from her neighbours' farm (Mary Mbaabu (PW2- Mbaabu). She picked her torch and walked to the source of the noise where she found Luka and Julius (Luka is the appellant here) assaulting Tonny Kiraithe (the deceased). She knew Julius and the appellant since childhood. According to her:

“I stood at about 2 metres from where the two were assaulting the deceased. They saw me. I stood there for about 5 minutes. I spoke to them asking them to stop beating the deceased and take him to hospital. They continued to beat him. They never responded.”
3. She left the scene and went to the house of the mother of the deceased (Grace Munjiru – Munjiru –PW6) where she reported the incident after which she went back to her house and slept. The next morning as she was walking to Munjiru's house to fetch water she stumbled on the dead body of the deceased which had been abandoned on the side of the road. She reported her findings to Jeremano Mwiti (Mwiti – PW3) which led to the arrest of the appellant and his co-accused.
4. Mbaabu had employed the appellant and his co-accused as guards at her farm. He too woke her up on that night (16<sup>th</sup> March, 2014) telling her that she should go see a thief at her farm. She declined the invitation due to the hour of the night. They told her that the thief was Tonny (the deceased) and she asked them to take him to the police. The next morning, upon information, she walked towards her farm where she found the body of the deceased. She then fell ill and could only record a statement with police two days later.
5. According to Mwiti the deceased was his youngest brother. On the material day he received information from Kainyu acting on which he visited the scene and found the body of his brother. Kainyu told him that she had witnessed assault on the deceased by the appellant and his co-accused the previous night. He and others apprehended the appellant and surrendered him to the police. He noted that the body of the deceased had injuries on the back and neck.
6. Jediel Kaberia Ntoiti (Ntoiti-PW4) was woken up early in the morning by his brother Mwiti who informed him of the death of their brother. He visited the scene and found the body by the side of a footpath. He was one of those who apprehended the appellant and handed him over to Laare Police Station.
7. Munjiri was asleep in her home on 16<sup>th</sup> March, 2014 when she was woken up by screams at 2 a.m. She went out and found the appellant and his co-accused assaulting her son (the deceased). They were assaulting him using Meru pangas known as “kimee”. When she asked why they were assaulting him the appellant responded that they were beating the deceased because he had stolen miraa from Mbaabu's farm. She went back home and upon visiting the scene in the morning she found the body of the deceased laying on the side of a footpath and she noted many injuries on the body. She and her sons reported the matter at Laare Police Station.
8. Dr. Said Mohamed (the doctor- PW5) of Meru Level 5 Hospital produced in court a post-mortem report prepared by his colleague Dr. Guantai in respect of the body of the deceased. Post-mortem



revealed a bruise to the posterior service of the neck and over the right shoulder. There was a fracture between C2 and C4 and cause of death was respiratory failure secondary to fracture of cervical spine C2 to C4.

9. The last prosecution witness was Moses Wanjala Kusimba (the police officer- PW7) who at the material time was attached to Laare Police Station at which station a murder report was made on 16<sup>th</sup> March, 2014. Accompanied by other police officers they visited the scene they found a body which they photographed and removed to Meru Level 5 Hospital where postmortem was conducted. He and his colleague drew a sketch plan of the scene and collected a shoe belonging to the deceased which he produced into evidence. He also produced into evidence a sword (called kimee C-line).
10. When the prosecution case was closed the appellant upon being put on his defence gave a sworn statement where he stated that he was a businessman dealing in miraa. On the material day upon visiting the farm where he was employed as a guard he was informed by the night guard that miraa had been stolen by a thief who was apprehended and taken to the owner of the farm. He was shown the trees from which miraa had been stolen. When the night guard left a brother of the deceased came to the farm accompanied by others who asked him to be a witness in a case where a thief who had been arrested had died. When he declined to be a witness he was apprehended, taken to the farm owner where he found the night guard tied with ropes. He was also tied up; they were taken to the police and he denied that he was involved in the murder of the deceased. As we have seen the appellant was convicted and sentenced.
11. The appellant has appealed those findings through homemade “Supplementary Grounds of Appeal” where he says that the trial Judge erred in law and fact in failing to appreciate the fact that the prosecution never proved the critical element of malice aforethought in murder hence the same was not proved to the required standard; that the Judge erred in admitting hearsay evidence; that the evidence of PW2 and PW6 was doubtful because they were relatives of the deceased; that the evidence adduced by the prosecution was contradictory and unreliable; that the sentence of 25 years imprisonment was harsh and excessive and should be reviewed.
12. When the appeal came up for hearing before us on 26<sup>th</sup> February, 2025 on a virtual platform the appellant was present from Manyani Maximum prison and was represented by learned counsel Mr. Wahome Gikonyo. Learned counsel Mr. Muriithi was present for Office of Director of Public Prosecutions. Mr. Gikonyo informed us that he had gone through “grounds of appeal” and written submissions and was fully relying on the same. The appellant states in those submission that other than the death of the deceased whose cause was doubtful the other aspects to prove murder were not proved. He cites the case of Republic vs. Mohamed Dadi Kokane & 7 Others [2014] eKLR where the ingredients to prove murder were set out. It is submitted that the prosecution failed to create a nexus between the offence and an intention by the appellant to kill.
13. It is submitted in support of ground 2 of the appeal that the prosecution did not prove the velocity of light or the intensity of the torch which Kainyu had and that her evidence was not credible; that evidence by Munjiri that she was woken up by noise, went to the scene and witnessed the deceased being beaten and then went back to sleep was not believable; that the sword “kimee –a-c-line” that Munjii saw with the attackers which was produced in court was only one; that the evidence of Kainyu and Munjiru was hearsay evidence; that the evidence was contradictory. It is finally submitted that the sentence was manifestly harsh, excessive and unconstitutional. The appellant says that he was in custody for 5 years, 2 months and 12 days from the time of arrest to the date he was sentenced and that in view of section 333 of Criminal Prosecution Code that period should have been taken into account in the sentence awarded to him.



14. Mr. Muriithi also fully relied on written submissions where it is submitted that the prosecution proved the case beyond reasonable doubt; that all ingredients to prove murder as provided in section 203 of the *Penal Code* and as set out in *Nyambura & Others vs. Republic* [2001] eKLR were proved. It is submitted that the fact of death was proved through the witnesses who testified in the case; that the cause of death was proved through the doctor's evidence who confirmed that the cause of death was as a result of respiratory failure secondary to fracture of cervical spine C2 to C4 due to blunt injury to the posterior neck. It is submitted by the respondent the acts of the appellant and his co-accused was unlawful as shown through evidence tendered in the case who saw the appellant and his co-accused viciously assaulting the deceased leading to his death. It is submitted that the requirements in proof of malice aforethought as provided in section 206 of the *Penal Code* were met and the case of *Bonaya Tutu Ipu & Another vs Republic* [2015] is cited where this Court stated on malice aforethought:

“Malice aforethought” is the mens rea for the offence of murder and it is the presence or absence of malice aforethought, which is decisive in determining whether an unlawful killing amounts to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case.”

15. It is submitted that the appellant used a kimee-c-line panga or sword to assault the deceased and that he should have known that such action could cause death or grievous harm to the deceased.

16. On whether there were contradictions or inconsistencies in the prosecution case the respondent cites the case of *Richard Munene vs Republic* [2018] eKLR where it was stated on the issue of contradictions or inconsistencies in a case:

“Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused. It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

17. The respondent states that there were no contradictions in the case but that if there were any they were minor and did not affect the prosecution's case. It is submitted that the appellant's defence was considered and rejected and, on sentence:-

“... we submit that the trial court properly exercised discretion in sentencing. The same should not be interfered with.”

18. We have considered the whole record, submissions and the law.

19. To prove the offence of murder section 206 of the *Criminal Procedure Code* requires that the prosecution establish beyond reasonable doubt:

- i. “the fact of the death of the deceased
- ii. the cause of death.
- iii. proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person, and



- iv. proof that the said unlawful act or omission was committed with malice aforethought.”
20. Those ingredients were set out in the case of *Republic vs. Mohamed Dadi Kokane & 7 Others* (*supra*).
  21. The prosecution paraded 7 witnesses to prove its case. Star witnesses included Kainyu who was woken up by noise in the night and when she went out to investigate she shone her torch and witnessed the appellant and his co-accused, people she knew very well as they were her neighbours and employees in a neighbouring farm assaulting the deceased. She stood next to them and even spoke to them telling them to take the deceased to hospital because he was seriously injured.
  22. Munjiri who was also woken up by noise or a scream went out and found the appellant and his co-accused assaulting the deceased. They were using a kimee-c-line sword. She also spoke to them and the appellant informed her that they were assaulting the deceased because he had stolen miraa from Mbaabu’s farm. These two witnesses and other witnesses visited the scene early in the morning and found the deceased dead, his body abandoned on the side of a footpath. All these witnesses – Kainyu, Munjiru, Mbaabu, Mwiti, Ntoiti – testified as to the fact of death of the deceased and the prosecution passed that hurdle as required by section 206 of the said Code.
  23. On cause of death the doctor produced post-mortem report which showed that the deceased died as a result of respiratory failure secondary to fracture of cervical spine C2 to C4.
  24. Kainyu and Munjiru witnessed the appellant and this co-accused assaulting the deceased using a sword which was produced into evidence. They both spoke to the appellant asking that the assault should stop and the deceased be taken to hospital. The appellant and his co-accused did not heed this advise but instead continued assaulting the deceased where they inflicted such severe injuries that led to the death of the deceased. They abandoned the body on the side of a footpath and the appellant was apprehended that same morning as he walked to the farm where he was employed as a guard, walking there without caring about what he had done. Kainyu and Munjiru were categorical on what they separately witnessed that night – the vicious assault, the attackers, the weapons used. The appellant did not care that assaulting the deceased with a deadly weapon could and did cause the death of the deceased. The injuries suffered were fatal and it is the unlawful act of the appellant that caused the death of the deceased.
  25. Malice aforethought was proved through the weapons used and the nature of the injuries inflicted which led to the death of the deceased.
  26. The trial Judge considered the appellant’s defence and, in our view, properly rejected it in view of the strong prosecution case that had been mounted against him.
  27. The last issue for our consideration is the one of sentence where the appellant complains that he was in custody for about 5 years and that the period in custody was not considered when sentence was awarded.
  28. It is true that section 333 of the *Code* requires a sentencing court to take into account a period where the accused has spent time in custody. This Court had this to say on that aspect in *Abamad Abolfathi Mohammed & Another vs. Republic* [2018] eKLR:

The appellants have been in custody from the date of their arrest on 19<sup>th</sup> June 2012. By dint of section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial



court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest on 19<sup>th</sup> June 2012.”

29. This is how the issue of sentence was dealt with by the trial Judge:

“Mr. Igweta:

In Mitigation the accused is remorseful. He is 45 years and a family man. He has children who depend on him.

He has been in custody for the last 5 years. He prays for leniency.”

30. The Judge then ordered that a pre-sentence report be filed within 14 days and when it was produced the record shows the following:

“Court:

I have considered the mitigation. That the accused is a first offender. I have also considered the Pre- sentence report on record on victim views.

A life was lost at the hands of the accused. I sentence the accused to 25 years imprisonment.”

31. It is patently clear that although counsel on record for the appellant reminded the trial Judge that the appellant had been in custody for 5 years there is no evidence on record that the Judge took that issue into consideration. That failure was in breach of section 333 of the *Code* and was pre-judicial to the appellant. It was required in law as has been explained in detail by this Court in the *Abamad Abolfathi Mobammed & Another vs. Republic* (supra) case that the period spent in custody be taken into account in considering what sentence to mete out in the case. We note, of course, that the sentence for murder under section 203 as read with section 204 is death but having decided to award a custodial sentence the Judge should have considered the period served in custody or state in clear terms that he has considered and taken into account that period. To that extent only does this appeal succeed.

32. In the end, therefore, the Appeal on conviction fails and is dismissed. The appeal on sentence succeeds only to the extent that the sentence of 25 years’ imprisonment imposed by the trial Judge will run from 31<sup>st</sup> March, 2014 when the appellant was first presented to Court as the date of arrest is not clear on the record.

33. Those, then, are our orders.

**DATED AND DELIVERED AT NYERI THIS 20<sup>TH</sup> DAY OF JUNE, 2025.**

**S. OLE KANTAI**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL ALI – ARONI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

