



**Kambi & another v Republic (Criminal Appeal 5 & 6 of 2019  
(Consolidated)) [2025] KECA 1428 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1428 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CRIMINAL APPEAL 5 & 6 OF 2019 (CONSOLIDATED)  
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA  
JULY 31, 2025**

**BETWEEN**

**GEORGE MWIRIGI KIAMBI ..... 1<sup>ST</sup> APPELLANT**

**JAPHET MUTEMBEI FRANCIS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Meru  
(A. Ong'injo, J.) dated 5th July 2018 in Criminal Case No. 34 of 2008)*

**JUDGMENT**

1. This is a first appeal by George Mwirigi Kiambi and Japhet Mutembei Francis (the appellants). They were together with 4 others initially charged, tried, and convicted for murder contrary to section 203, as read together with section 204, of the *Penal Code* in the High Court at Meru. The particulars of the information were that on 23<sup>rd</sup> April 2008 at Rwarene Village, Giathathu sublocation, Mweru Location in Imenti South District within Meru County (formerly Eastern Province) jointly with others not before the court, they murdered Francis Gichari Miriti.
2. They pleaded not guilty to the charge and the matter proceeded to full hearing with the prosecution calling seven witnesses. On their part, after being placed on their defence, the appellants testified on oath but called no witnesses.
3. The trial court having considered all the evidence placed before it found that the prosecution had proved its case beyond reasonable doubt and convicted the appellants, and having considered their mitigation and the aggravating circumstances surrounding the commission of the offence sentenced them to death. The trial court acquitted the other 4 accused persons charged alongside the appellants.



4. Aggrieved by both conviction and sentence, the appellants filed this appeal citing several grounds, which we will advert to later.
5. Our mandate on first appeal enjoins us to re-evaluate, re-assess, and re-analyze the evidence on record so as to arrive at our own conclusions. This means that we must consider the evidence presented in the trial court, evaluate it independently, and draw our own conclusions, with a caveat, however, that we did not see or hear the witnesses as they testified, and, therefore, make due allowance for that. See the often-cited case of Okeno -vs- Republic [1972] EA 32.
6. In summary, the prosecution's case was as follows; on 23<sup>rd</sup> April, 2008 at around 7.30pm Caroline Mukiri Miriti, (PW1) was at Kiandegge Market where she was selling paraffin. Her mother called her to inform her that her father, Francis Miriti Gichari, (deceased) had been set on fire.
7. She testified that in response she told her neighbour called Karegwa to take her to the scene. She went to the scene where she saw the body of her father that was completely burnt. She testified that his hands and legs had been tied with ropes. She testified that from there, she was taken to Kiandegge Police Station where she reported the matter. She also said that earlier the same day she had seen the 1<sup>st</sup> appellant's brother carrying a black jerry can of 5 litres and since she thought that he was looking for paraffin, she called him. She stated that he told her that the 1<sup>st</sup> appellant had sent him to buy petrol worth Kshs.200.00.
8. Luciana Mukwa Njeru Miriti, (PW3) the deceased's wife testified that on the material date, she was at home with her husband at 7.00 am preparing breakfast and thereafter her husband went to conduct tuition for some students. He came back home at 4.00 pm from school and again left for Kiandegge Market. That after 5 minutes, she heard noise next to the road and she rushed there and saw about 10 people chasing her husband. She followed the crowd to the main road and at the junction she found her husband seated on the ground with his hands and legs tied and he was seated on the ground. That when she asked him what had happened, he told her that the money he had lent to Elizabeth had brought problems.
9. She testified that the deceased said Elizabeth, who was the 5<sup>th</sup> accused person before the trial court claimed that the deceased had given her money tainted with witchcraft. PW3 further testified that the village headman was at the scene. She testified that Luciana Nkunu assaulted the deceased with a stick. She said that the 5<sup>th</sup> accused person had the money and the loan agreement. Further she testified that the agreement was witnessed by Agatha Njeri and Regina Kiragu. She stated that she offered a cow to Luciana, the 4<sup>th</sup> accused so that they could resolve the problem amicably but she never responded.
10. She told the court that Francis Mbae Justus and Fredrick Gikunda Kiambi, 1<sup>st</sup> and 6<sup>th</sup> accused persons grabbed her and threw her into a nearby ditch and when she stood from the ditch, she saw the 1<sup>st</sup> appellant pouring petrol on her husband and the 2<sup>nd</sup> appellant lit a match stick and set the deceased on fire. She raised an alarm and called her daughter, PW4 to bring a vehicle to take her father to hospital. That all the assailants ran away.
11. She stated that she reported the matter and police visited the scene and collected the body of the deceased. She stated that Fredrick Gikunda Kiambi, the village headman was at the scene and he pushed her into the ditch instead of protecting her. PW3 said that the incident took place at 6.40 p.m. and she could clearly see the assailants. She said that Nancy, PW4 came to scene when she was negotiating with the assailants not to harm the deceased. She said the scene was 50 metres away from her home. She said that she negotiated with the 1<sup>st</sup> appellant, Luciana, 4<sup>th</sup> accused and Elizabeth, 5<sup>th</sup> accused, but they did not want to listen to her.



12. PW4, Nancy Kathomi testified that on 23rd April 2008 at around 7.00pm she was coming from Igojo Boys' School where she was working. That on reaching the junction she saw her parents talking to the 2<sup>nd</sup> appellant and his mother, the 4<sup>th</sup> accused. She found them talking under a tree. She stated that she found about ten people at the scene and they were listening to what was being said. They were talking about the money that her father had lent out to Elizabeth, the 5<sup>th</sup> accused. She said that the money involved was Kshs.5,000.00.
13. She testified that her mother offered to give the assailants a cow and alternatively, she suggested that they should take her father to the police. She testified that she did not expect any trouble since the headman, the 1<sup>st</sup> accused was present. She testified that it was her father that had given Elizabeth, the 5<sup>th</sup> accused Kshs.5,000.00. She testified that Luciana, the 4<sup>th</sup> accused claimed that they were wasting her time and hence she took a stick which she used to assault her father. Later she stated that she saw the 6<sup>th</sup> accused person throwing her mother into a ditch.
14. She stated that suddenly she saw the 1<sup>st</sup> appellant pouring petrol on her father and immediately after the 2<sup>nd</sup> appellant lit her father with a matchbox. She stated that when she raised alarm, the assailants escaped. She stated that she followed her mother to the police station to report the incident and by the time they returned to the scene, her father was dead.
15. Agneta Njeri Mbae, (PW5) testified that on 17<sup>th</sup> April 2008 while at her kiosk at Kyeni Cha Ndege Market at around 9.00 am, guests came and went to the back of her landlord's premises, one Regina Kirogu. She stated that after a few minutes Regina came to her kiosk with the two guests who were introduced to her by Regina. She stated that the guests were Elizabeth Wekesa, the 5<sup>th</sup> accused and the late Miriti. She testified that the deceased told her that there was money he was giving and which was to be paid with interest and she was requested to be a witness. She witnessed the 5<sup>th</sup> accused receive Kshs.5,000.00 from the deceased.
16. No. 498999 P.C John Siluda, investigated the murder and preferred charges against the accused persons including the appellants. He said when they visited the scene with OCS Nkubu and other officers, they found the village was deserted and the 1<sup>st</sup> accused, the village elder, could not be traced to assist.
17. He testified that they looked around and saw the body of the deceased in a ditch. The body was lying on the back and the hand stretched upwards. The body was burnt but it could be identified. The burns were severe and the legs were tied with a rope. The feet were still in the shoes, the deceased was only in underpants and all other clothes were burnt. He stated that there was the smell of petrol. He testified that the scene was disturbed and they noted that the deceased rolled from there to the ditch. He said the widow to the deceased identified the suspects and they were arrested later and they were taken to police station and charged with murder.
18. Dr. Njuguna Mbere testified that he was a medical officer at Meru Level 6 Hospital. He presented a post-mortem report conducted on 25<sup>th</sup> April 2008 by Dr Macharia in respect to Francis Miriti Gichari. (deceased). He testified that on external appearance the body was extensively burnt with burns greater than 90% and that the cause of death was severe burns.
19. In his defence, the 1<sup>st</sup> appellant testified that he was against his wife taking a loan from the deceased. He testified that at 5.00pm on 23<sup>rd</sup> April 2008 he was at home baking cakes and that after he sent a salesman to go and do supplies, he finished baking at 8.00 pm and because he was concentrating, he did not hear anything. He said he did not send his brother to buy petrol as he had no business to do with petrol. He said that the boy that PW4 claimed she saw with petrol was very young by then and was not made a witness. He said he did not pour petrol on the deceased body. He said he learnt of the murder



- on 24<sup>th</sup> April 2008, the same day he was arrested. He said he did not leave his house on the night of 23<sup>rd</sup> April 2008 and he did not see the deceased that day. He said his mother, Luciana, the 4<sup>th</sup> accused was in her house and that his wife, the 5<sup>th</sup> accused came back home at 4.30 pm and she did not leave the house.
20. He said, Fredrick Gikunda Kiambi, the 6<sup>th</sup> accused, used to work in Tharaka Nithi and could come over the weekend. He said he had no problem with his wife being given a loan to boost their business as it was to be repaid. He said his home is 1 km from the deceased's home and he did not hear any noise. He said it was not true that his wife had reported that they had differed and there was no association between his wife and the deceased.
  21. On his part, the 2<sup>nd</sup> appellant also gave a sworn statement. He testified that his village and that of the deceased bordered each other and his home is 4 Km from that of the deceased. He said that the 1<sup>st</sup> appellant was his neighbor. He stated that on 23<sup>rd</sup> April 2008 in the evening, he went to Mukuru Market at 7.30 pm using the route through Makutano. He said that they passed by Nancy Kathomi the deceased person's daughter's home. That ahead of them a group of people came saying that someone had been burnt. When they heard this, they did not proceed with the journey. He said he was in the company of Jackson Samburungi who was in prison by the time of his testimony. He said it was dark and he did not identify the people he heard say that someone had been burnt. He said that it had also rained during the day. He said it was not true that he lit the match stick that was used to set the deceased on fire. He said that his co-accused were not his relatives and he did not know anything about the borrowed money. He said he did not see Francis Mbae Justus, the 1<sup>st</sup> accused on the material day and he doesn't know what he does but he confirmed that he used to see him. He said he did not see Luciana, Elizabeth and Fredrick, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused persons on the material day.
  22. The trial court was not persuaded on their innocence and consequently, they were convicted and sentenced to death.
  23. The appellants initially lodged separate appeals each raising nine grounds, which were later amended to four grounds by their advocate in the undated supplementary memorandum of appeal. They state that the evidence of the prosecution was full of contradictions and hence ought not to have been relied upon to convict; that the learned Judge erred in law and in fact in failing to find that PW3 did not properly identify the appellants as the circumstances of identification were not favourable and/or free from error; that the conviction was against the weight of evidence and that the ingredients of the offence of murder were not proved.
  24. We heard this appeal on 6<sup>th</sup> February 2024. The appeal was canvassed by way of written submissions with no oral highlights. Ms. Nelima learned counsel, appeared for the appellant, whereas Ms. Nandwa, prosecution counsel, appeared for the respondent.
  25. With regard to grounds 1, 3 and 4, counsel submitted that the conviction was against the weight of evidence and that the prosecution failed to prove their case to the required standard. It was submitted that the prosecution failed to prove all the ingredients of the offence of murder and especially that it is the appellants who caused the death of the deceased. Further that the Judge erred in law and fact in relying on contradictory evidence to convict.
  26. It was submitted that the evidence did not point to the appellants as the persons who caused the death of the deceased. That in fact according to the post mortem report and the evidence of PW7 the deceased was killed by a mob and not as a result of the actions of the appellants who it was alleged poured petrol on the deceased and lit a match. Counsel submitted that the identification of the appellants by PW3 and PW4 as the real culprits is wanting especially because their evidence is inconsistent and contradictory.



27. It was submitted that PW3, for example, in her statement to the police never mentioned the appellants as having poured petrol and lit the match. That however, in her evidence in chief, this piece of evidence comes out for the first time, making it doubtful whether she is speaking the truth. It was submitted that nothing stopped PW3 from telling the police the first time she made her statement that the 1<sup>st</sup> appellant poured petrol on the deceased while the 2<sup>nd</sup> appellant lit the match. It was further submitted that to now come four years later and make such allegations can only be termed as an afterthought and a lie.
28. The evidence of PW2, Caroline Miriti was also challenged as untruthful for the reasons that she stated that she is the one who made the first report to the police and knew the assailants. Further it was submitted that if indeed she knew them, then she ought to have given their names to the police which she did not. Reliance was placed in *Simiyu & Another -vs- Republic* [2005] eKLR for the proposition that this Court held that when it comes to identification by recognition of the accused where the complainant fails to mention the attackers to the police such omissions raise doubt as to the complainant's identification of the attackers.
29. It was submitted that the failure by Caroline to mention the attackers to the police and the contradictions in the evidence of PW3 cast doubt in the prosecution's case and the learned Judge ought not to have placed reliance on such evidence to convict but should have resolved the doubts in the prosecution's case in favour of the appellants and acquitted them.
30. Further it was submitted that the circumstances under which PW3 claimed to have recognized the assailants were not conducive for proper identification as she told the court that the people pursuing her husband were 30 in number and that she was pushed into a ditch and that when she came out of the ditch she was confused and shocked.
31. We were urged to find that the evidence adduced was contradictory, unreliable and incredible to warrant a conviction.
32. Finally, it was submitted that should this Court find otherwise, then we should be minded to reconsider the sentence meted out on both appellants and find that it was harsh and excessive given the circumstances under which the offence took place and that the appellants were first offenders.
33. We were urged to take into consideration the time the appellants have spent in prison and to reduce the sentence and set the appellants at liberty.
34. In response, Ms. Nandwa submitted that the death of the deceased was not in dispute as the post-mortem conducted on 25<sup>th</sup> April 2008 stated that the cause of death was severe burns up to 90%.
35. On who had caused the death of the deceased, learned counsel submitted that the prosecution proved beyond reasonable doubt that it was indeed the appellants who committed the unlawful act that cost the deceased his life. It was submitted that there was direct evidence from PW3 and PW4 who saw the 1<sup>st</sup> appellant pour petrol on the deceased and the 2<sup>nd</sup> appellant lit the match starting the fire that scorched the deceased's body.
36. It was submitted that from the evidence of PW3 and PW4 it was evident that the appellants acted together in murdering the deceased and that they both had the same intention and they managed to execute it to the end. Reliance was placed on Section 21 of the *Penal Code* which provides for the doctrine of common intention. Further reliance was placed in *Stephen Ariga & Another -vs- Republic* [2018] eKLR.
37. On identification by recognition, it was submitted that the identification of the appellants was by recognition by PW3 who confirmed that she knew both appellants because they used to go to the same



church. It was submitted that the incident occurred at around 6:40 pm which is early in the evening and that there was still light and darkness was yet to set in. Further, that the appellants were persons known to PW3 and PW4 and hence that there was no mistake in regard to the identification. Reliance was placed in Mamush Hibro Faja -vs- Republic [2019] eKLR.

38. As to whether the appellants had malice aforethought it was submitted that it is very clear from the evidence on record that the appellants wanted the deceased to die which is seen in the way they set him on fire. Further, that the appellants had bought petrol which is highly flammable and the 1<sup>st</sup> appellant poured the same on the deceased and the 2<sup>nd</sup> appellant lit him up with a matchstick.
39. It was submitted that the post-mortem form indicated that the deceased body had 90% burns, inhalation injuries and extreme burns on the upper airway and the cause of death was found to be severe burns, and hence that the prosecution proved malice aforethought against the appellants.
40. According to Ms. Nandwa, there was no contradiction in the evidence of the prosecution witnesses as alleged by the appellants. She maintained that the evidence of the prosecution was clear, concise, corroborated and consistent. And further that if there were any inconsistencies as alleged by the appellant the same do not go to the root of the prosecution case. Reliance was placed in W.W.N. -vs- Republic [2020] eKLR.
41. On alibi defence, it was submitted that the evidence of the prosecution outweighed that of the appellants as the evidence of PW3 and PW4 placed both the appellants at the crime scene and that the defence of the appellants was an afterthought. Reliance was placed in Victor Mwendwa Mulinge -vs- Republic [2014] eKLR.
42. Lastly, counsel submitted that since the appellants were sentenced to suffer the death penalty which sentence is not in any way harsh as the same is commensurate with the offence. It was submitted that the deceased was brutally murdered by the appellants by being burnt to death. That the deceased's hands were tied and the perpetrators were two in number and that the deceased was not given an opportunity to defend himself or better still that they would have reported him to the police which they chose not to do. Therefore, it was submitted that the death sentence meted out on the appellants was befitting and appropriate. Reliance was placed on Stanley Kipkurui Maritim -vs- Republic [2022] eKLR.
43. In conclusion it was submitted that the prosecution did prove its case beyond reasonable doubt and that all the elements of murder were established and most importantly malice aforethought. We are urged to uphold both the conviction and sentence.
44. Having carefully considered the record of appeal, submissions by respective counsel, our mandate, and the law, the two issues that fall for our determination are whether the prosecution proved the offence of murder against the appellants as required in law and whether the sentences imposed on the appellants were appropriate.
45. For the offence of murder to obtain, therefore, three elements which the prosecution must prove beyond reasonable doubt are -:
  - a. the death of the deceased and the cause thereof;
  - b. that the accused committed the unlawful act which caused the death of the deceased; and
  - c. that the accused did so with the malice aforethought.

See Nyambura & Others -vs- Republic [2001] KLR 355.



46. There is no dispute at all as to the death of the deceased and the circumstances in which the deceased met his death. Indeed, from the post-mortem it was indicated that the deceased died as a result of severe burns.
47. On who caused the death, from the evidence on record, it is clear that the appellants were seen at the scene of crime by both PW3 and PW4, wife and daughter of the deceased and it is on record from the testimonies of the two that they even interacted with them with PW3 even offering to settle whatever matter that was the problem between them and the deceased, and pleading with them to report the matter at the police station instead of harming him.
- They declined PW3's offer to go and sell a cow to get the money that was being demanded from the deceased.
48. The violent act of burning the deceased was witnessed by PW3 and PW4. Their evidence was hardly controverted by the appellants. Indeed, they testified that they began to scream when they witnessed the appellants pouring petrol on the deceased and lighting him up and that the appellants and the other assailants run away.
49. All these events occurred in broad daylight estimated to be around 6:30 pm. Therefore, the identification of the appellants by the PW3 and PW4 could not have been in doubt.
50. On malice aforethought, section 206 of the [Penal Code](#) provides, inter alia:
- “Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -
- 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; and
  - 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.”
51. Did the evidence establish the requisite malice aforethought on the part of the appellants? From the evidence of the various witnesses more so the two eyewitnesses, PW3 and PW4, it was clear that the actions of the appellants towards the deceased were calculated as they had bought petrol and brought matchsticks and ropes at the scene which were used to tie the deceased's legs with, pour, light and burn the deceased at the scene until he died. All this was unprovoked and their intent and mission was to kill the deceased.
52. As rightly observed by the trial court, the pouring of petrol on deceased by the 1<sup>st</sup> appellant and striking of a match by the 2<sup>nd</sup> appellant was what caused the death. The appellants' actions of dousing the deceased in petrol and setting him on fire, after tying him on his hands and legs to make sure he did not escape were obviously calculated to cause his death or to do grievous harm to him.



53. Given all the foregoing, we are satisfied, just like the trial court, that malice aforethought was established against the appellants beyond peradventure.
54. With regard to the severity of sentence, section 379(1)(a) and (b) of the *Criminal Procedure Code* provides for this Court's jurisdiction to entertain an appeal against sentence from the High Court sitting as the trial court where the sentence is fixed by law.
55. In *Francis Muruatetu & Another -vs- Republic*, the Supreme Court of Kenya Petition No. 15 & 16 of 2016, the Court gave sentencing guidelines with regard to mitigation before sentencing in murder cases.
56. We take note that during mitigation the appellants stated that they were first offenders, young and that they had young families that were dependent on them and prayed for leniency.
57. In her ruling on sentence, the learned Judge while taking note of the mitigation, observed that the appellants took it upon themselves to take the deceased's life which is sacred and created by God, that they tied the deceased's hands and legs and immobilised him before dousing him with petrol and setting him on fire. That they were not moved by the deceased person's wife's plea to pardon the deceased for whatever sins/crime he had committed. They even refused to report the deceased to the police station if he had wronged them, and instead took the law into their own hands and executed the deceased.
58. It is also clear that the attack was committed after some level of planning, where the appellants had bought petrol, ropes and matchsticks in advance. In our view it involved some considered level of planning; it was not a spontaneous explosion of blind rage; the appellants knew exactly what they wanted to do; and they accomplished their mission.
59. We take note that at the time of sentencing, the trial Judge had the option of sentencing the appellants to a sentence other than death considering our emerging jurisprudence, courtesy of *Muruatetu* case (*supra*), that it is no longer the case that death is the mandatory sentence for murder. The respondent urges us that even as we review the sentence, that we impose a stiff sentence given the aggravating circumstances in this case; and guided by the principles set out by the Supreme Court in *Muruatetu* (*supra*).
60. We are persuaded that in these circumstances, the appellants deserve to not only realise the gravity of their actions, and be kept away from the community for a long time; and in our considered view, the death sentence as handed down by the trial court is appropriate. There is nothing to suggest that the trial court failed to exercise its discretion in sentencing improperly.
61. In the present case, the appellants committed a heinous and unprovoked attack against a defenceless man whom they immobilized by tying his legs with ropes and burning him to death. The circumstances under which the offence was committed, the brutality displayed by the appellants, and the traumatic impact of the heartless and fatal assault on the deceased in the presence of his wife and daughter were thoroughly considered by the trial court. Consequently, the imposition of a death sentence by the trial court was appropriate in our view.
62. However, in view of the general repugnance of the death sentence, we are inclined to interfere with the sentence herein, without losing sight of the circumstances we have set out above. Accordingly, we allow the appeal on sentence and set aside the death sentence and substitute therefor a sentence of 40 years' imprisonment.
63. In the result, the appeal against conviction is dismissed. This appeal succeeds only to the extent that the sentence has been substituted as stated above.



DATED AND DELIVERED AT NYERI THIS 31<sup>ST</sup> DAY OF JULY, 2025.

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

