



REPUBLIC OF KENYA



**KENYA LAW**  
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**Musyoka v Republic (Criminal Appeal 76 of 2022)  
[2025] KECA 1318 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1318 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CRIMINAL APPEAL 76 OF 2022  
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA  
JULY 18, 2025**

**BETWEEN**

**PETER WAMBUA MUSYOKA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgement of the High Court of Kenya at Garsen  
(Nyakundi, J.) delivered on 11th March 2020 in Criminal Case No. 13 of 2016)*

**JUDGMENT**

1. The appellant, Peter Wambua Musyoka, was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars of the offence as contained in the information was that, on 19<sup>th</sup> September 2016 at Chagoto Village in Adu Sub-Location of Magarini sub-County within Kilifi County, the appellant murdered Mwatu Mutiso.
2. At the outset, we make an observation that the trial was conducted by three different Judges. At the commencement of hearing by a succeeding judge, Section 200 (3) of the [Criminal Procedure Code](#) was explained to the appellant, who had no objection to the continuation of the trial by the succeeding judge. PW1 - PW7 testified before Chitembwe, J.(as he then was), PW8 - PW10 testified before Korir, J. (as he then was) and the defence case was heard by Nyakundi, J. who also wrote the Judgment.
3. In proof of its case, the prosecution called a total of 10 witnesses whose evidence, including that of the defence, we summarise as follows: PW1, Nicholas Mutiso Musyoka, who hailed from Briini Village in Adul Location was burning charcoal at his farm on the material day. Muema Mutiso (PW4) passed by while on his way from upper Buni area and tarried a while with him before he left. PW1 then heard the voice of PW4 asking whether he was still there since the appellant had killed the deceased. PW1 rushed to the scene and found PW4 carrying the deceased and assisted him to move the deceased from the scene of crime in the forest to the road. PW1 observed that the deceased had a cut at the back of his



- head; that he sent PW4 to notify the villagers; by this time, it was a few minutes to 6.00 p.m.; that they informed police officers from Adu Police Station; and that, on the following day when they (PW1 and the villagers) returned to the scene, they recovered a panga, poles and the appellant's shoes.
4. In cross examination, PW1 stated that he did not see the appellant kill the deceased, but that it was PW4 who heard the deceased scream that the appellant had killed him.
  5. PW2, Rose Martha Musyoka, the deceased's mother, received information that a young boy had been killed; that, on going to find out who had been killed, she found the body of her son at PW1's place near the road; that the body had cuts on the head; that she accompanied the deceased's body to the police station. She stated that she did not have any grudge with the appellant.
  6. PW3, Samson Mwalimu from Buni, Adu Location, testified that PW4 came to his house in the evening and told him that the appellant had killed the deceased; that he then called the village elder and the Chief; that he went to the scene where he found the body of the deceased with a cut at the back of his head; that the village elder visited the scene in the company of the appellant who had been traced to his grandfather's place; and that, upon enquiring from the appellant as to what had happened, he stated that he just realised that he had cut the deceased.
  7. PW4, Muema Mutiso, the deceased's brother, in corroborating the evidence of PW1, testified that, on the material day, he was on his way home, but that he passed by PW1's farm where he stayed for a short while before taking a shortcut to go home; that, while walking home, he heard the deceased crying and rushed to where he was; that the deceased told him that he 'had been killed'; that after enquiring from the deceased who it is that killed him, the deceased stated that it was the appellant; that he attempted to assist the deceased but, when he became too heavy, he placed him by the roadside and went to call PW1; and that, together with PW1, they carried the deceased to the road after which he looked for PW2 and informed her of what had happened.
  8. PW5, Kazungu Kahindi Tsuma, a resident at Adu sub- Location, received the news of the deceased's death from Samson Mwalimu, a village elder. He visited the scene and later learnt that it was the appellant who had killed the deceased; that he was informed that the appellant was hiding in his grandfather's house; and that, together with others, they went and arrested him and escorted him to Adu Police Station.
  9. PW6, Musyoka Mulu, the appellant's grandfather, testified that, on the material day, he went to the farm together with the appellant; that their tools of trade were a panga and an axe; that the appellant was burning charcoal at his farm; that he went to relieve himself in the forest, but that when he came back, the appellant was nowhere to be seen; that he spent the whole day at the farm, and, when he went home that evening, he did not find the appellant; that, at around 7.30 p.m., he learned that the appellant had assaulted the deceased; that he rushed to the scene and that the appellant was later brought to the scene. PW6 stayed at the scene until the following morning when the police came to take away the body.
  10. PW7, Samson Thethe, the area Assistant Chief, received the news of the assault from the village elder; that he directed the village elder to look for the appellant and arrest him; that the village elder and the Nyumba Kumi leader arrested the appellant; and that he accompanied them to escort the appellant to the police station.
  11. PW8, Dr. Joab Kaya, a medical doctor at Malindi sub-Cunty Hospital, produced the postmortem report dated 22<sup>nd</sup> September 2016, and which had been prepared by Dr. Angone. According to the report, the deceased who was 8 years old sustained a deep cut on the occipital region (back) of the head which exposed the brain matter and that, that was the cause of the death.



12. PW9, George Lawrence Ogunda, a Government Chemist, conducted the forensic analysis of the items recovered from the scene, namely a panga and a pair of jeans trouser; and that, after a DNA analysis, he found that the blood on the panga had the deceased's blood. He produced the report dated 14<sup>th</sup> October 2016 as Exhibit No. 5.
13. PW10, Police Inspector Charles Gadende, then in charge of Crime Branch at Malindi Police Station, was the investigating officer. In summing up the evidence of the prosecution witnesses, he testified that, on 19<sup>th</sup> September 2016 at around 8.00 p.m., he was at Adu Police Station when he received a report from the area Chief of a murder incident; that the appellant was escorted to the police station on 20<sup>th</sup> September 2016 by PW3, PW5 and PW7 after having been arrested from the house of PW6. He corroborated the testimonies of PW1 and PW4 with regard to the events leading to the death of the deceased; that PW1 recovered a panga about 20 metres from the deceased's body; and that he took the panga and the jeans trouser which the deceased was wearing and handed them over to the Government Chemist for analysis.
14. In cross examination, PW10 stated that he learnt that the panga which was recovered from the scene was given to the appellant by his grandfather; that the appellant had been instructed by his grandfather to use the panga to clear the bush and make charcoal; that the appellant admitted to him that he was with the deceased, and that he just found himself having cut the deceased; that the motive of the killing remained a mystery since there was no known bad blood between the parties as they were brothers; and that the mental assessment report showed that the appellant was mentally stable.
15. After close of the prosecution's case, the trial court ruled that the appellant had a case to answer and was accordingly put on his defence. He opted to give a sworn statement. He testified that, on the material day, he left the farm at 6.00 p.m. and that, when he went home, his grandmother informed him that the deceased had passed on; that he was then arrested by the villagers on allegations that he was the suspect; that the deceased as well as PW4 were his brothers; and that there was no grudge between him and the deceased that would have prompted him to kill the deceased.
16. Upon the conclusion of the trial, the appellant was found guilty and convicted accordingly. The learned Judge (Nyakundi, J.), in concluding that all the elements of the offence of murder were proved, found that the death of the deceased was not disputed; that his death was caused by fatal wounds which was confirmed by PW8, the pathologist, through the post mortem report; that the appellant had the intention to cause grievous harm to the deceased, which led to his death; and that, on this ground, the death of the deceased was unlawful.
17. As to whether there was malice aforethought, the learned Judge observed that: given the nature of the weapon that was used, being a panga; that PW4 found the deceased at the scene crying for help, yet the appellant did nothing to help him; the fact of targeting the head, which is a vital organ, was prima facie evidence that the appellant intended to cause the death of, or seriously maim, the deceased; and that, therefore, inevitably, the appellant committed the offence with malice aforethought.
18. As to the identification or recognition of the appellant as the perpetrator of the crime, the court held that PW4, who conversed with the deceased before he slid into a comma, told him that it was the deceased who had attacked him; that this disclosure amounted to a dying declaration pursuant to Section 33 of the *Evidence Act*; that the evidence of PW4 remained uncontroverted; that PW6 testified that he was with the appellant in his farm and that, when he excused himself to go to answer to a call of nature, the appellant was nowhere to be seen; that, when PW6 returned to his home, the appellant was not within the precincts of the homestead; and that, from those circumstances, coupled with the



results of the DNA analysis which placed him at the scene of crime, it was only him who would have committed the offence.

19. The appellant was accordingly sentenced to serve 30 years imprisonment.
20. Aggrieved by both the conviction and sentence, the appellant filed an undated memorandum of appeal and later an undated amended grounds of appeal by which he was aggrieved that the learned Judge erred in law and in fact: by failing to appreciate that the prosecution never proved their case beyond reasonable doubt; by convicting the appellant on contradictory, inconsistent and un-corroborating evidence; by failing to consider that the threshold of circumstantial evidence was never met; and by not considering his defence.
21. We are accordingly urged to quash the conviction, set aside the sentence and forthwith set him (the appellant) at liberty.
22. We heard this appeal on 23rd February 2025. Learned counsel Mr. Adala appeared for the appellant while Senior Principal Prosecution Counsel Ms. Mutua appeared for the respondent.
23. Mr. Adala highlighted the appellant's submissions dated 3<sup>rd</sup> February 2025. He submitted that there was no witness who saw the appellant kill the deceased, thus the absence of direct evidence linking the appellant to the death of the deceased. He urged us to pay attention to the evidence of PW1 and PW4, who attempted to link the deceased's death to the appellant; that it was not established that the appellant was last seen with the deceased so as to import the doctrine of last seen with as was held in *Mwambegu vs. Republic (2023) KECA 866 (KLR)* where the court held that, for the doctrine of last seen with to be applicable, the circumstantial evidence must overwhelmingly link the accused person to the death of a deceased person; that PW6 suggested that he was with the appellant for a substantial part of the material day; and that the appellant's panga and axe were found at the place where both of them were.
24. It was Mr. Adala's submission that the element of malice aforethought was not established. Reliance was placed on the decisions of this Court in *Anthony Ndegwa Ngari vs. Republic (2014) KECA 424 (KLR)* where the Court found that malice aforethought was not proved in circumstances where the appellant therein struck the deceased with a sword after a drinking spree; and *Isaack Kimanthi Kanuachobi vs. Republic (2013) KECA 392 (KLR)* where the Court, after analysing the facts before it, found that no malice aforethought was established where the appellant stabbed the deceased with a penknife; that, in this case, it was not established who struck the deceased with a panga; and that, furthermore, the appellant and the deceased being blood brothers, the element of malice aforethought was not established.
25. On the application of a dying declaration, counsel submitted that a dying declaration falls under hearsay evidence, and is generally inadmissible unless qualified by a person as provided in Section 33 of the *Evidence Act*; that, for a dying declaration to be admissible, certain conditions must be established, namely: that the dying declaration should be corroborated as was held in the case of *Uganda vs. John Ochieng* (but Counsel did not provide us with the citation to this case); and that the declarant must be a competent witness only if he would have lived. According to counsel, the declarant in this case was not a competent witness as he later died. To support this submission, reference was made to the decision in *R vs. Pike (1829) 3 CLP 598* where the dying declaration of a four-year-old child was held to be inadmissible.
26. Lastly, counsel submitted that the 30 years imprisonment term was harsh and excessive; that the trial court erred in not considering the wishes of the appellant's mother, who was also the deceased's mother, to the effect that a non- custodial sentence was the most suitable sentence in the circumstances of the



case as she did not wish to lose another child; and that the 4 years that the appellant was in custody prior to the sentencing should have been considered to constitute part of the sentence.

27. Ms. Mutua fully relied on the respondent's written submissions dated 4th January 2025. It was submitted that all the elements of the offence of murder were established. While referring to the cases of Nzuki vs. R (1993) (KECA) 83 (KLR); and R vs. Tubere s/o Ochen (1945) 12 EACA 63 on what constitutes malice aforethought, it was submitted that the appellant's act of inflicting injuries using a sharp machete, targeting the vulnerable part of the deceased's head and leaving him at the scene after the attack, falls within the ambit of the definition of malice aforethought.
28. It was submitted that the identification of the appellant was through circumstantial evidence; that the dying declaration of the deceased to PW4, which was corroborated by a chain of events as narrated by PW6 and buttressed by the evidence of the Government Analyst, left no doubt that the appellant was culpable for the murder of the deceased; that the blood samples drawn from the deceased matched the blood found on the murder weapon and the shorts worn by the appellant on the material date; that, based on the application of the principles of what constitutes circumstantial evidence by this Court in Mwangi & Another vs. R (2004) KECA 104 (KLR), there was no doubt that the appellant was properly identified.
29. The respondent refuted the allegations that the appellant was a minor at the time of arrest; that he was 22 years old at the time of arrest and 26 years old as at the time of sentencing; and that the age of the appellant was not an issue during the hearing, and that this submission ought to be dismissed.
30. As regards the issue as to sentence, it was submitted that the sentence meted out on the appellant was lawful; and that, as a consequence, the appeal should be dismissed.
31. This being the first appellate court, its duty is to reconsider, re-evaluate and re-analyse the evidence on record afresh and come up with its own conclusion. We must however consider the fact that we neither saw nor heard the witnesses testify, for which we must give due allowance. Aptly put, a first appeal is in the form of a retrial. This duty was explained in the case of Gabriel Kamau Njoroge vs. Republic (1987) KECA 4 (KLR) as follows:

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect. (See Pandya vs R [1957] EA 336, Ruwala v R [1957] EA 570). If the High Court has not carried out its task, it becomes a matter of law on second appeal whether there was any evidence to support the conviction.”

See also Okeno vs. Republic (1972) E.A. 32

32. From our analysis of the evidence and the respective submissions, we find that the issues arising for determination are:
  - i. whether the dying declaration of the deceased was admissible in the context of the competency of the declarant and the person who reported.
  - ii. whether the statement of the dying declaration was corroborated.
  - iii. whether the offence of murder was proved to the required standard; and
  - iv. whether the sentence was lawful.



33. This is a murder case that involved siblings. It is unfortunate that the deceased's life was cut short when he was only 8 years old, while the appellant was 22 years old as at the time of the commission of the offence.
34. For the offence of murder to be established, the prosecution must prove beyond reasonable doubt the fact of the death of the deceased and the cause of the death; the positive identification of the perpetrator; and that the perpetrator committed the offence with malice aforethought.
35. In the case of *Anthony Ndegwa Ngari vs. Republic* (2014) KECA 424 (KLR), the ingredients that must be proved so as to warrant a conviction for the offence of murder were summed up as follows:
- “For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:
- (a) the death of the deceased and the cause of that death;
  - (b) that the accused committed the unlawful act which caused the death of the deceased and
  - (c) that the accused had the malice aforethought.”
36. It is an indubitable fact as to the death of the deceased. The post mortem report produced by PW8 as did PW1, PW2, PW3, PW4, PW5, and PW6, and the appellant, all confirmed this fact. Indeed, PW1, PW2, PW4, PW5 and PW6 saw the body of the deceased even before it was moved to the mortuary. The cause of the death was indicated in the post mortem report to be “deep cut wound on the occipital region inflicted with a panga. Brain matter noted”. This leaves us to determine the issue as to whether the appellant was the perpetrator, whether the death was caused by an unlawful act on his part, and that it was actuated by malice aforethought.
37. The conviction of the appellant was premised on the dying declaration of the deceased. PW4 was the crucial witness in this respect. He is also a sibling to the appellant and the deceased. His testimony was that, as he took a shorter route home, he heard the deceased crying and screaming and, when he went to find out what had transpired, he found him writhing on the ground helplessly. The deceased told him that ‘he had been killed’. He then fell into a state of unconsciousness. PW4 testified as follows:
- “I heard the deceased screaming. It was on a path. Mwetu (the deceased) was crying. Mwetu told me that he has been killed. I asked him who had cut him. He told me it was Peter (the appellant).”
38. The appellant has challenged the admissibility of the dying declaration on two fronts: first, in the context of the competency of the declarant for the reason that, since he was a child, a *voire dire* examination required to be conducted so as to test whether or not he appreciated the reception of evidence and the need of speaking the truth in court, as well as the meaning and nature of an oath in the event he were to give a sworn statement of evidence; and, secondly, that the dying declaration was not corroborated.
39. Section 19(1) of the *Oaths and statutory Declarations Act*, Cap. 15 provides as follows:
- (1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is



possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the *Criminal Procedure Code* (Cap. 75), shall be deemed to be a deposition within the meaning of that section.

40. The predecessor of this Court in *Kibageny vs. Republic* (1959) EA 92 correctly observed that there is no definition as to who a child of tender years is and, therefore, it is at the trial court's discretion to evaluate the competency of the child before it as follows:

“There is no definition in the Oaths and Statutory Declarations Ordinance of the expression ‘child of tender years’ for the purpose of s. 19. But we take it to mean, in the absence of special circumstances, any child of an age, or apparent age, of under fourteen years; although, as was said by LORD GODDARD, C.J., in *R vs Campbell* (1), [1956] 2 All E.R. 272,

‘Whether a child is of tender years is a matter of the good sense of the Court...’

Where there is no statutory definition of the phrase. The two boys in this case, both of whom were estimated to be under fourteen years old, must therefore be considered as children of tender years.”

41. The purpose of a *voire dire* examination is well settled as, *inter alia*, an opportunity for the court to satisfy itself that the child is conscious of the duty to speak the truth, and whether the child understands the meaning of an oath. The case of *Johnson Nyoike Muiruri vs. Republic* (1983) KLR 445 summarised the relevance of *voire dire* examination as follows:

- “i) The purpose of a *voire dire* is for the court to form an opinion whether the child understands the nature of the oath so that if his evidence is accepted, the court is satisfied that the child is possessed of sufficient intelligence and understands the duty of speaking the truth;
- ii. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.
- iii. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.
- ii. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.
- ii. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction.”

42. With those principles in mind, and to answer the appellant's apprehension, on 5th December 2016, Chitembwe, J. (as he then was) conducted a *voire dire* examination on PW4. With precision, the trial Judge asked questions to assess the intelligence of the child. He concluded that he was satisfied that ‘the witness is intelligent enough. He should testify under oath. He is physically strong.’ Our findings



are that the trial court discharged its duty in assessing the competency of PW4 by conducting a *voire dire* examination as required under the law. Consequently, this limb of the ground that PW4 was not a competent witness for the reason that a *voire dire* examination was not conducted fails.

43. The second limb of the appellant's contention is that the dying declaration ought to have been corroborated on the ground that the declarant, being an 8-year-old child, was not a competent witness if he were alive. To support this argument, Mr. Adalla invited us to be persuaded by the decision in *R vs. Pike* (*supra*) where the court held that the dying statement of a 4-year old child could not be admitted since he was not considered a competent witness *ab initio*. However, counsel did not provide to us with a copy of this decision for our benefit, more so for us to appreciate the basis on which the court arrived at this conclusion. On our part, we have established that the decision is from a court in India having been cited as *R v. Pike*. C & P.1829; 3: 598. 26 Indian *Evidence Act*, 1872, Criminal Manual. 14<sup>th</sup> ed. Lucknow: Eastern Book Company, 2003: p15. On this score, we emphasise to counsel the need to specify the court that rendered a particular decision and, as is required under this Court's procedure, counsel should have filed physical copies of the relevant authorities.
44. The absurdity in this argument is that counsel would have us believe that a dead person's dying declaration is not a competent statement to be qualified and accepted by the court. Simply stated, a dead person's dying declaration is not admissible. There is no known law or principle in criminal law in our jurisdiction that requires that a deceased person's dying declaration can only be admitted by dint of their being alive. That is to say that a dying declaration is only admissible if the declarant is alive. In *Simon Kiptum Arap Choge & 3 Others vs. Republic* (1984) KECA 4 (KLR), this Court held that:
- “The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death”
45. In any event, the deceased was a brother to the appellant, and not a stranger to him. Furthermore, an eight-year-old child, unless for any established reason, is possessed of sufficient intelligence to know who his siblings are, and one who cannot just resort to making such wild allegations against his brother. Most importantly, the deceased was conscious for a period of time between the moment he was struck with the murder weapon and the time he died. In this interlude, he was well aware of the person who cut him. Indeed, PW4 found him still conscious albeit in pain, and he fell into unconsciousness after he had disclosed who 'had killed him'.
46. Section 33 (a) of the *Evidence Act* provides for admissibility of statements made in the course of death of a person as follows:

Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases-

- (a) relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of



death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

47. In *Pius Jasunga s/o Akumu vs. Republic* (1954) 21 EACA 333, this Court had the following to say on the issue of dying declarations:

“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this Court in numerous cases and a passage from the 7<sup>th</sup> Edition of Field on Evidence has repeatedly been cited with approval.....It is a rule of law that in order to support a conviction there must be corroboration of a dying declaration (*R -v- Eligu s/o Odel & Another* (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration.”

48. Similarly, this Court in *Musili vs. Republic* (1991) KECA 1 (KLR), as regards the place and admissibility of dying declarations, stated as follows:

“The law in Kenya relating to acceptance of dying declarations as evidence is clear that whilst corroboration of a statement as to the cause of death made before his death by the deceased is desirable it is not always necessary in order to support a conviction..... To say so would be to place such evidence on the same plane as accomplice evidence and would be incorrect.”

49. Further, the Court in *Philip Nzaka Watu vs. Republic* (2016) KECA 696 (KLR), it was held that:

“Under Section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.”

50. From the foregoing, the following elements of dying declarations stand out, that is:

- i. The statement must have been made by the deceased.
- ii. The statement must refer to the accused.
- ii. The statement must relate to the cause of one’s death, or as to any of the circumstances of the transaction which resulted in one’s death.
- iii. Whereas there is no standing rule on the need for corroboration of a dying declaration, extreme caution must be taken in assessing the weight to be attached to a dying declaration.

51. From the analysis of the afore-cited jurisprudence, it is clear that it is not mandatory, as an exception to the rule of hearsay evidence as provided under Section 33 (a) of the *Evidence Act*, that a statement of declaration of death must be corroborated. It also comes out clearly that courts have been cautious in admitting such evidence in the absence of some degree of corroboration for the reasons that: first, it is evidence which will not be subjected to cross examination; and, secondly, in the heat of the moment, a deceased person who met his death in unusual circumstances may have a questionable mindset.



52. Even assuming that the deceased did not make a dying declaration just before he died, applying the principles of circumstantial evidence, and in this case, the same being relevant since there were no eyewitnesses who saw the appellant fatally assaulting the deceased, the appellant would still be held culpable. There are two cardinal rules applicable to inferring the guilt of an accused based on the application of circumstantial evidence, namely:
- a. The inference sought to be drawn, must be consistent with proved facts; and
  - b. The proved facts should be such that they exclude every reasonable inference save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.
53. In *Ndumo vs. The State* 1997 BLR 738 CA at 741-2, Tebbutt. JA. sitting at the Botswana Court of Appeal, had this to say on the caution the court has to take before drawing inferences on circumstantial evidence:
- “Circumstantial evidence must ‘always be narrowly examined’. Before drawing the inference of the guilt of an accused from circumstantial evidence, it is necessary for the court to be sure that there are no co-existing circumstances which would weaken or destroy the inference.”
54. This Court in *Ahmad Abolfathi Mohammed & Sayed Mansour Mousavi vs. Republic* (2018) KECA 743 (KLR) set out the conditions under which circumstantial evidence will be admitted, which principles were restated in the unreported case of *Abanga alias Onyango vs. Republic* Cr. App No. 32 of 1990 as follows:
- “It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:
- i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
  - ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
  - iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.”
55. In the same vein, in *James Mwangi vs. Republic* (1983) KECA 106 (KLR), this Court held that:
1. In a case dependant on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be in compatible with the innocence of the Accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt.
  2. In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co- existing circumstances which would weaken or destroy the inference .....



56. The above position was amplified by this Court in *Joan Chebichii Sawe vs. Republic (2003) (KECA) 182 (KLR)* where it was held:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

57. The evidence of PW6 was that he was at the farm with the appellant on the material day; and that when he went to relieve himself, he found that the appellant was not around and continued to work until evening. This discounts the testimony of the appellant that he was working in the farm and returned home at 7.00 p.m. only to be met with the news of the deceased’s death. We further note that, in cross-examination, the appellant did not refute the allegations that he was with PW6 on the material date.

58. That aside, the DNA forensic report was not rebutted by the appellant. The report established that, on examination of the murder weapon, a panga that was found a few meters from the deceased’s body (Exhibit B) and the appellant’s green shorts (Exhibit C), viewed against the deceased’s blood sample (Exhibit A), generated a match against the deceased’s blood. Consequently, there cannot be any other inference of facts based on the circumstantial evidence as to the person who killed the deceased. Having been at the scene of the murder, coupled with the fact that the DNA analysis linked him to the deceased’s death, the circumstances lead to nothing other than an inference of guilt, and that it is only him (the appellant) and no one else who could have murdered the deceased.

59. Thus, we find and hold that the appellant was positively placed at the scene of crime, and that the prosecution proved that the deceased was killed by the appellant. This now leaves us to determine the question as to whether the appellant had malice aforethought when he killed the deceased.

60. Malice aforethought is described in Section 206 of the *Penal Code* thus:

Malice aforethought shall be deemed to be established by evidence proving anyone 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.

62. In *Joseph Kimani Njau vs. Republic (2014) KECA 229 (KLR)*, where the Court pronounced itself on the ingredients of malice aforethought and held:

- “iii. .... Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.



‘It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....’”

62. Likewise, in *Nzuki vs. Republic* [1993] eKLR, the Court had the following to say with regard to malice aforethought:

“Without an intention of one of these three types, the mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder. See the case of *Hyam v Director of Public Prosecutions*, [1975] AC 55.

In an appeal such as the present one, any one of the intentions set out above is a necessary constituent of the offence of murder contrary to section 204 of the *Penal Code* and the burden of proving any such intention is throughout on the prosecution. No doubt, if the prosecution prove an act the natural consequence of which should be a certain result and no evidence or explanation is given, then the Court may, on a proper direction, find that the accused is guilty of doing the act with the necessary intent, but if on the totality of evidence there is room for more than one view as to the intent of the accused, the Court should direct itself that it is for the prosecution to prove the necessary intent to its satisfaction, and if, on a review of the whole evidence, it either thinks that that intent did not exist or it is left in doubt in respect thereof, the accused should be given the benefit of that doubt. Thus, where on a charge of murder the evidence does not exclude the reasonable possibility that an accused person killed the deceased by an unlawful act but without the intent necessary to constitute legal malice requisite to the proof of that offence, that killing would only amount to manslaughter. See *Rex v Steane*, [1947] 1 KB 997; and *Sharmpal Singh s/o Pritam Singh v R* [1960] EA 762.”

62. Additionally, in the case of *Hyam vs. DPP* (1974) A.C., the Court held, inter alia, that:

“Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another, the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”

62. The post-mortem report was consistent with the evidence that the injuries sustained by the deceased were intended to cause his death, or were meant to cause grievous harm. The intensity of the force used while assaulting the deceased speaks for itself as demonstrated by the post mortem report. It indicated that the death of the deceased was due to “...deep cut wound on the occipital region inflicted with a panga. Brain matter noted”. Furthermore, the appellant aimed at the head of the deceased, a vital organ which he ought to have known that, if injured, would cause grievous harm or the death of the deceased.

62. Applying the principles of circumstantial evidence, we note that the appellant ran away after the incident. His conduct was no doubt indicative of the fact that he was conscious that what he had done was wrong, and the only inference that can be drawn from such conduct is of his guilt. In *Oluoch & Another vs. Republic* (2022) KECA 1260 (KLR), the Court considered a scenario where the 2<sup>nd</sup> appellant therein, ran away from the crime scene and held that:

“The 2<sup>nd</sup> appellant escaped and was arrested the following morning while in hiding and injured. We find that, in the circumstances, the act of running away was inconsistent with



the innocence of the 2nd appellant. The 1st appellant was arrested at the scene and handed over to the police. The chain of events leading to the arrest of the appellants was not broken but, rather, pointed unerringly to their guilt.”

62. In view of the foregoing, we find that the prosecution proved its case beyond reasonable doubt. The appellant’s defence which was ably considered by the trial court to the effect that he learnt of the deceased’s death from his grandmother, and that he had no reason for which he would have killed his brother, was ousted by the strong prosecution evidence. We thus uphold his conviction which we find was based on sound evidence.
62. Turning to the issue of sentence, the extenuating circumstances of the murder and more so the fact that the deceased was only 8 years old when he met the cruel death meted by his then 22-year-old brother, waters down the plea of his mother that a probationary sentence was judicious. Imposing a non-custodial sentence would be a pat on his back, yet the sentence must be proportional to the offence committed. The appellant did not front any single justification for brutally murdering his little brother who hoped to live to see many more years. We also take to mind the fact that a sentence must serve the objectives of, inter alia, deterrence, retribution and denunciation as provided for in the Judiciary Sentencing Policy Guidelines, 2023.
62. However, we have considered the submission that the appellant spent 4 years in custody prior to sentencing, and which period the trial court did not take into account when computing the sentence meted out. It is trite that a trial court is obliged to take into account the time spent in custody by an accused person by dint of Section 332 (2) of the *Criminal Procedure Code*.
62. In Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (2024) KESC 34 (KLR), the Supreme Court reiterated and affirmed that the period spent in remand custody prior to conclusion of the trial must be factored in sentencing in accordance with Section 333 (2) of the *Criminal Procedure Code*. This position was echoed by this Court in Momanyi vs. Republic (2022) KEHC 16302 (KLR) where it was stated that the trial court is obligated to deduct the period spent in custody from the total sentence. The Court emphasized that the requirement is not merely a procedural formality, but a substantive right of the accused so as to ensure that the punishment is fair and just.
62. From the record, it is clear that the appellant was arrested on 19<sup>th</sup> September 2016 and was sentenced on 11<sup>th</sup> March 2022. He remained in remand custody throughout the trial, which accounts for a period of three years and 6 months.
62. In the end, we find that the appeal fails and is hereby dismissed. We uphold both the conviction and sentence as pronounced the Judgment of the High Court at Malindi (Nyakundi, J.) dated 11<sup>th</sup> March 2020 save that the 3 years and 6 months which the appellant spent in custody prior to being sentenced shall be deducted from the 30-year term of imprisonment.
62. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF JULY, 2025.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArb.**

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**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**

