Muriithi v Republic (Criminal Appeal 119 of 2018)
[2025] KECA 1244 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KECA 1244 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 119 OF 2018

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

JULY 11, 2025

BETWEEN

MOSES MUTEMBEI MURIITHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Chuka (R.K. Limo, J.) dated and delivered on 25th October 2018 in Criminal Appeal No. 8 of 2016)

JUDGMENT

1. This is a first appeal by Moses Mutembei Muriithi (the appellant).

   He was initially charged, tried, and convicted on the information of murder contrary to section 203, as read together with section 204, of the *Penal Code* in the High Court at Chuka. The particulars of the information were that on 7th October 2016, at Kabaliange Village, in Kamonka Sub- County within Tharaka Nithi County, the appellant murdered Mary Nthama.

2. Upon a thorough evaluation of the evidence tendered by the seven prosecution witnesses, the trial court, in a judgment dated and delivered on 25th October 2018, determined that the prosecution had established its case against the appellant beyond reasonable doubt. Consequently, the appellant was convicted. The court considered the appellant's mitigation, the aggravating circumstances surrounding the commission of the offence, and the impact on the victim's family, and imposed a sentence of life imprisonment. It is that judgment that the appellant has appealed before this Court.

3. This being a first appeal, we are duty-bound to re-evaluate, re- assess, and re-analyze the evidence on record so as to arrive at our own conclusion. However, we should bear in mind that we did not have the advantage of seeing or hearing the witnesses as they testified, and, therefore, make due allowance for that. See the often-cited case of Okeno -vs- Republic [1972] EA 32.

4. Having stated our mandate, it is necessary to revisit the evidence that was laid before the trial court so as to place the appeal in proper perspective. The prosecution called a total of seven witnesses in a bid to prove its case against the appellant. On the other hand, the appellant made an unsworn statement of defence and called no witnesses.

5. In brief, the prosecution's case was as follows; Julius Muthengi Mwenda, (PW1) the deceased's husband testified that on 7th October 2016 the deceased left her home and went for a chama meeting at around 5.00pm within Kamonka Village. He stated that his son Robert Muriithi later told him that his wife had been killed at a neighbour's house, the appellant herein. He testified that he called the assistant chief on his mobile phone before heading to the appellant's homestead where he found his wife's lifeless body lying on the ground. He stated that he noticed her teeth were crashed and one eye was popping out and that there was a huge stone with blood stains at her side. He identified in court the stone weighing over 10kgs. He also testified that the appellant lived around 100 meters away from his home.

6. Maureen Kanjira (PW2) testified that she was 13 years old and that the appellant was her father and her mother was one Evanjaline Kajoka. She stated that on 7th October 2016 at around 6.00pm, the appellant picked a quarrel with her mother when she came back home asking her where she had been. That he attempted to beat her mother with a stick but her mother ran away. She testified that shortly after the deceased arrived and inquired whether her mother was at home and the appellant stood up and slapped the deceased as a result of which she fell down. That the appellant kicked her in the stomach as she together with other children screamed for help; that the appellant chased them away and they ran for cover.

7. She testified that she saw her father take a huge stone and throw it on the deceased who was still lying down. She testified that she clearly saw the appellant throw the stone which was used as a cooking stone outside their house and that the stone hit the head of the deceased near the ear as she lay down after being slapped and kicked in the stomach by the appellant.

8. John Muriithi, (PW3) a brother to PW2 and a son of the appellant corroborated PW2's evidence. He testified that he also saw the appellant slapping and kicking the deceased in the stomach when she fell down backwards. He also stated that he saw the appellant lifting a huge stone outside their house and hitting the deceased on the head as she lay on the ground.

9. Evangeline Kajoka (PW4) testified that she was the appellant's wife and mother to PW2, PW3 and PW6. She told the court that on 7th October 2016 she was from a church meeting and she arrived home at around 6. 00pm. She stated that the appellant picked a quarrel with her and attempted to beat her forcing her to run for safety at her brother-in-law's house nearby. She told the court that even before she settled, she heard screams from her children whom she had left at home being PW2, PW3, PW6 and two other young ones. She stated that she saw the children running fast towards her screaming.

10. She, further, testified that when the children reached where she was, they appeared to be shocked and she asked them what was wrong. That PW3 told her what had happened. She stated that she later in the company of two women, Gatune and Doreen Kawira went back home and confirmed that indeed the deceased had been hit on the head with a huge stone which was lying beside her head. She testified that the deceased lay dead with her head crashed causing her eyes to pop out from their sockets and her face looked disfigured. She identified the stone in court as one of the three cooking stones she used for cooking outside her house. According to her the fragments of the stone were on the smashed head of the deceased. She stated that the appellant was not at the scene when they arrived.

11. Dr. Justus Kitili (PW5), was the doctor who performed the post- mortem examination on the body of the deceased on 13th October 2016 at Chuka Hospital Mortuary. His findings were that externally there was blood in the mouth, nostrils and ears with the left eye damaged. Internally, he noted depressed skull fracture on the base of the skull and blood clot (subdural hematoma) on the frontal part of the brain. His opinion on the probable cause of death was severe head injury inflicted by a blunt object.

12. Nancy Kawira (PW6), testified that the deceased was her father.

    She corroborated the evidence of her siblings PW2 and PW3. She testified that on the material date her father, came home and when he noticed that their mother had not arrived, he threatened that he was going to kill her. That when her mother PW4 arrived the appellant chased her and she ran away to their uncle's home. She stated that shortly thereafter the deceased arrived enquiring about their mother and it was then that the appellant rudely told her off by telling her that he did not want "evil spirits" in his compound before descending on her with a slap and kicks as she fell down. She testified that she also saw the appellant hit the deceased on the head with a huge stone before she and her siblings run away.

13. CIP Juma Wawire, (PW7) told the court that he received a report about the murder from the assistant chief who called him on his mobile phone at around 10.00pm on the material day. He, together with other officers proceeded to the scene where they found the deceased lying down in front of the home of the appellant. He testified that part of the deceased's head had been smashed by a stone which was recovered at the scene. He stated that the stone was blood stained and he believed that it was the murder weapon.

14. He further testified that he did not get the appellant at home as he had run away. That on 15th October 2016 he was called by the OCS Marimanti Police Station and told that the appellant had been arrested. He went for the appellant and charged him with the offence of murder.

15. When placed on his defence, the appellant made an unsworn testimony and called no witnesses. He testified that the deceased died as a result of bad luck. He told the court that on the material day he had gone to help a neighbour with construction of a house where he smeared mud on the walls and that later they went for a drink before returning home at around 5.00 pm. He further added that he found his children alone at home who told him that their mother had gone for a church meeting. He told the court that the wife later arrived and he asked her to wash his muddy clothes and inquired why she came home late. He said that a quarrel ensued between him and his wife before he told her to disappear which she did. He further told the court that as he prepared to leave the homestead, he saw the deceased who looked annoyed.

16. He testified that the deceased was annoyed because he had sent his wife away thus spoiling her party that Sunday. He told the court that the deceased then jumped on him but he dodged her which made her stumble upon a stone in the compound before she fell. He stated the deceased fell down in his compound and could have been injured by rocks in the compound due to her drunken state. He further stated that he clearly saw her fall down head first with her forehead hitting the ground. He added that he left her lying down and never bothered to find out whether she was dead or alive and did not know whether she died on the spot or on the way to hospital.

17. As already stated, the trial court, in a judgment dated and delivered on 25th October 2018, found that the prosecution had proved its case against the appellant, convicted him, and sentenced him to life imprisonment.

18. Aggrieved by the decision, the appellant lodged this appeal on grounds, inter alia, that the trial court erred in fact and in law in; failing to note that the ingredients of murder were not proved beyond reasonable doubt; failing to note that the ingredient of section 206 of the *Penal Code* was

not proved; failing to note that this case was manslaughter not murder; and by failing to consider the accused defence statement without giving a cogent reason of doing so yet the same was remarkably comprehensive in casting doubt to the strength of the prosecution case.

19. When this appeal came up for hearing on 7th February 2024, learned counsel Mr. Wamache M. Amos appeared for the appellant, while Ms. Nandwa, Prosecution Counsel, appeared for the respondent. The appeal was canvased by way of written submissions with brief oral highlights.

20. Counsel for the appellant submitted on the sentence only. He urged us to consider the sentencing guidelines in Muruatetu & another -vs- Republic and Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021). It was submitted that the holding was very clear and underscores the importance of receiving and considering mitigating circumstances and also of applying applicable sentencing guidelines even though the latter are a guide. It was submitted that to justify a life sentence, the judgment should have spoken to it, showing in black and white what the court considered and that in the absence of any demonstration of factors that could have led to such a harsh sentence the Court should consider the facts and circumstances surrounding the case.

21. In response, Ms. Nandwa submitted that the death of Mary Nthama is not in dispute as the prosecution witnesses testified that they saw the deceased dead. Further, that PW5 conducted a post-mortem on the deceased and formed the opinion that the cause of death was cardiopulmonary arrest due to severe head injury inflicted by a blunt object.

22. Learned counsel submitted that there was cogent evidence to show that the appellant committed the unlawful act which caused the death of the deceased; that the prosecution proved beyond reasonable doubt that the appellant was indeed the person who committed the unlawful act.

23. It was submitted that malice aforethought was proved. That the nature and manner in which the deceased was murdered was grievous and brutal and that the injuries inflicted were fatal and were the cause of her death. It was submitted that the appellant knew very well that by using a big stone to hit the deceased on her head, the same would cause grievous harm or cause her death.

24. Counsel submitted, further, that if at all there were inconsistencies in the evidence as alleged by the appellant the same do not go to the root of the prosecution case. That the evidence of the prosecution was clear, concise and consistent. Reliance was placed in Richard Munene -vs- Republic [2018] eKLR

25. Lastly, counsel maintained that since the appellant was convicted by a court of competent jurisdiction, the sentence imposed was lawful and proper.

26. Having carefully considered the record of appeal, submissions by respective counsel, and the law, the two issues that call out for our determination are whether the prosecution proved the offence of murder against the appellant as required in law and whether the sentence imposed on the appellant was appropriate.

27. For the offence of murder to be proved, 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.

28. There is no dispute about the death of the deceased and the cause.

From the evidence of the eye witnesses, the deceased did not fall on the stone and hit her head on it as concocted by the appellant. He was seen by PW2, PW3 and PW6 slapping and kicking the deceased on the stomach and later throwing a stone at her and hitting her with the stone on the head causing the deceased eyes to pop out from their sockets. The head was smashed as testified by PW4, PW5 and PW7.

29. 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 circumstance:-
>
> 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 death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> c. An intent to commit a felony;
>
> d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

Whether that person is the person actually killed or not, although such knowledge is accompanied by indifference.

30. Did the evidence establish the requisite malice aforethought on the part of the appellant? From the evidence of the various witnesses, it was clear that the actions of the appellant towards the deceased were calculated as he slapped the deceased, kicked her on the stomach and later threw a stone at her aiming at her head while she was lying on the ground following his slap. All this was unprovoked and his intent and mission was to kill the deceased.

31. Given all the foregoing, we are satisfied, just like the trial court, that malice aforethought was established against the appellant beyond peradventure. We find that both elements of actus reus and mens rea were proved. The appellant's conviction for murder was well founded. We dismiss the appeal against conviction.

32. On the sentence, we considered that in assessing the appropriateness of the sentence imposed on the appellant, the Court is guided by a plethora of decisions from this Court which have set out the principles to be applied in sentencing. The Judiciary has also formulated sentencing guidelines and compacted them into a document for ease of reference, particularly for courts of first instance.

33. On appeal, the ground shifts slightly and deference of the trial court's decision in sentencing must be had. This is clearly appreciated in Bernard Kimani Gacheru -vs- Republic [2002] KECA 94 (KLR) where this Court expressed itself as follows:

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

sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless anyone of the matters already stated is shown to exist."

34. In the present case, the appellant committed a heinous and unprovoked attack on a defenceless woman. The circumstances under which the offence was committed, the brutality displayed by the appellant, and the traumatic impact of the heartless and fatal assault on the deceased in the presence of his young children were thoroughly considered by the trial court. Consequently, the imposition of a life imprisonment term by the trial court was well deserved in our view.

35. However, this Court in the recent past, has developed jurisprudence to the effect that the indeterminate nature of the Life sentence is unconstitutional and we are drifting away from imposing life sentences. See Manyeso -vs- Republic (Criminal Appeal No. 12 of 2021) [2023] KECA 827 (KLR). For that reason, in as much as we feel that the life sentence was merited, we shall interfere with the sentence and we hereby, set it aside and substitute therefor a sentence of 40 years imprisonment. This appeal only succeeds to that extent.

DELIVERED AND DATED AT NYERI THIS 11TH DAY OF JULY 2025.

W. KARANJA

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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