Kithumbi v Republic (Criminal Appeal 110 of 2018)
[2025] KECA 1229 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KECA 1229 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 110 OF 2018

S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA

JULY 4, 2025

BETWEEN

ADRIANO KITHUMBI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Meru (Mabeya, J.) delivered on 5th July, 2018 in H.C. Criminal Case No. 81 of 2014)

JUDGMENT

1. The appellant herein was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* the particulars being that on 12th October, 2014 he murdered David Muthengi M'Ruanda. The prosecution called 7 witnesses in support of the charge while the appellant gave a sworn statement in his defence and called no witnesses. In a judgment delivered on 5th July, 2018 the appellant was convicted as charged and was sentenced to life imprisonment (Mabeya, J.).

2. Our duty as a first appellate court is well settled as a forum for consideration of issues of both law and fact. This mandate is provided by rule 31 (1)(a) of the Court of Appeal Rules 2022 which states:

   31.

   (1) On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power-

   (a) to re-appraise the evidence and to draw inferences of fact."

3. We shall therefore set out a background of the evidence tendered before the High Court as we exercise that mandate.

4. Marietta Nchoga (PW1- Marietta) testified that the appellant and the deceased are both her sons. On the material day she was seated outside her house speaking to the deceased, when the appellant came to them and said that he had been robbed of land. When the appellant asked the deceased to leave the appellant reportedly used a big stick to hit the deceased and that a struggle then ensued between them after which she ran away to her house while screaming for help. Marietta stated that the relationship between her two sons had been good and she could not tell why the appellant attacked the deceased. She was the only one at the scene.

5. Wilfred Mwangi, a police officer (PW2) took a statement under inquiry from the appellant. The appellant told him that he was with his mother (Marietta) and the deceased, that the deceased asked him to go away then hit him on the forehead with a panga. He retaliated by taking the panga and hitting the deceased and that the panga accidentally caught the deceased on the neck and that the deceased fell down.

6. Dr. Wambugu, a medical officer (PW3) produced a post mortem-report dated 16th October, 2014, prepared by his colleague, Dr. Chege. The deceased's cause of death was found to be massive hemorrhage due to a deep cut wound on the neck.

7. Fredrick Kibobori (Kibobori-PW4), a son of the deceased, testified that on the material day, he responded to his grandmother's screams and went to the scene, where he found the appellant holding a panga over the deceased, who was bleeding from a severed neck. The appellant chased Kibobori away with the panga. Kibobori later returned to the scene when a crowd had gathered and found the deceased had already passed on. The appellant was arrested at his home the same day. Kibobori told the court that he was not aware of any grudge between his deceased father and uncle, the appellant.

8. James Muthengi (Muthengi-PW5), another son to the deceased, told the court that he saw the appellant approach the deceased and their mother with a panga in hand. He observed this from his home about 80 metres away. He testified that the appellant was shouting loudly about being denied family land. Muthengi saw the appellant hit the deceased with the panga. He did not know of any grudge between the two.

9. Corporal Njoroge (PW6), the Investigating Officer told the court that when he and other police officers went to the scene, and to the appellant's home, the appellant surrendered with the panga, and DNA evidence confirmed the panga as the murder weapon.

10. Nahashon Mwamba (Mwamba-PW7), a nephew of the deceased, identified the body at the mortuary for purposes of post mortem.

11. That was the last prosecution witness and at the close of the prosecution case and upon the appellant being placed on his defence he testified on oath that on 11th October, 2014 he was told by his grandson, named Mutethia, that his mother Marietta had called him to their home. He went and found his mother with Kibobori, Muthengi and another son named Muthomi. His mother asked him to get her a cup and have a seat, to which he complied. She also asked him for tobacco and he said he would get it for her later. The appellant then asked his mother to show him where he could begin constructing his house, which question displeased Muthengi who wondered why they were discussing the issue of land; that the appellant and Muthengi exchanged words, and that the deceased appeared and told the appellant to leave. The appellant declined to leave, saying that he was talking to his mother. The appellant further told the court that the deceased then cut him with a panga. The deceased's sons then attacked him and the appellant swung his own panga in self-defence while attempting to flee and the panga caught his brother in the neck. He told the court that he did not intend to kill the deceased and

had no grudge against him. He said that he was injured by the deceased and his own nephews and that his treatment notes got lost in prison.

12. As earlier stated, after considering all the evidence, the trial court found the appellant guilty of murder and sentenced him to life imprisonment. Being aggrieved by this judgment, the appellant proffered the current appeal.

13. The appellant filed grounds of appeal stating that he was provoked and acted in self-defence. He has filed supplementary grounds of appeal through his lawyer, Messrs. Nelima and Associates Company Advocates dated 29th January, 2025 and submissions dated 20th February, 2025. He submits that the offence was not proved and he should have been charged with the lesser charge of manslaughter. He also opines that his defence was not considered and the sentence of life imprisonment was excessive. He submits that even if the conviction stands, he should be released on time served of 11 years.

14. This appeal was heard on the court's virtual platform on 27th February, 2025. The appellant was represented by learned counsel Miss. Nelima while learned counsel Mr. Muriithi appeared for the respondent. The parties relied on their written submissions as filed without finding any need to highlight any part of the submissions.

15. We have considered the record of appeal, the submissions by the parties and the relevant law.

16. To prove murder the prosecution must prove beyond doubt that a person died; who caused the death; proof that the death of the deceased was through an unlawful act or omission on the part of the accused and proof that the unlawful act or omission was committed with malice aforethought.

17. The evidence led by the prosecution was consistent on how Marietta, a senior citizen aged over 100 years old and who was nearly blind when she testified before the trial Judge told the Court how she was seated with the deceased outside her house when the appellant approached and after engaging pleasantries he demanded for his part of family land which demand did not sit well with the deceased and how an argument had started where the deceased did not want the issue of family land to be discussed.

18. Kibobori, a son of the deceased who was not far from the scene where his father was killed testified how upon being attracted by his grandmother's screams he ran to the scene where he found his stricken father sprawled on the ground and the appellant holding a panga over him.

19. Muthengi was at his house about 80m from the murder scene and his testimony was that he saw the appellant arrive at the scene where his father (deceased) and grandmother (Marietta) were seated; he saw that the appellant was armed with a panga which he used to cut the deceased.

20. There was also the evidence of the police officer (PW2) who took a statement under inquiry from the appellant who testified that the appellant informed him how the attack had taken place and how the deceased ended up dying.

21. Post mortem report conducted on the body of the deceased as produced by the doctor showed that the deceased died and it showed the cause of death. All the evidence also showed that the deceased died at the hands of the appellant who inflicted the fatal blow to the neck that caused massive hemorrhage that caused the death of the deceased. That death was caused by an unlawful act by the appellant who murdered the deceased in the manner we have described.

22. The prosecution was also required to prove that the unlawful act by the appellant was committed with malice aforethought.

23. The aspect of malice aforethought was discussed at length by this Court in the case of Waweru vs. Republic (Criminal Appeal 98 of 2020) [2023] KECA 622 (KLR) (26th May 2023) (Judgment) where the Court stated;

24. On whether the appellant had malice aforethought when he killed the deceased, Section 206 of the *Penal Code* provides that:-

> 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;
>
> 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."

25. This Court in Waweru vs. Republic (supra) also quoted the case of Nzuki vs. Republic [1993] eKLR, as follows:

> In the case of Nzuki v Republic (supra), this court defined malice aforethought as:
>
> > ...a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of Regina v Vickers, [1957] 2 QB 664 at page 670. An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of Conliffe v Goodman, [1950] 2 KB 237."

26. In Republic vs. Tubere S/O Ochen [1945] 12 EACA 63, the Eastern Africa Court of Appeal, set out the following factors to be considered in determining whether malice aforethought has been established:

> The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident."

27. In this appeal, the appellant went further to claim that he had been provoked and acted in self-defence. We have given due consideration to this assertion. This Court in Ahmed Mohammed Omar & 5 Others vs. Republic [2014] eKLR stated:

> In R v Williams [1987] 3 ALL ER 411, Lord Lane, C.J. held:
>
> > In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it."

28. In our considered view, the evidence on record shows that the appellant armed himself with a panga and struck his brother on the neck with the said panga. He inflicted the injury on a part of the body of the deceased that he knew would cause grievous harm or death. The evidence by prosecution witnesses was that the neck was nearly severed. This action by the appellant and the part of the body targeted; the weapon used and the severity of the injury were proof, as seen in Republic vs. Tubere (supra), that the action was intended to kill. Malice aforethought was proved beyond reasonable doubt. The appeal on conviction has no merit and is dismissed.

29. The appellant contends that the sentence awarded to him was harsh and excessive in the circumstances of the case. The appellant was convicted and sentenced to life imprisonment in 2018, a year after the Supreme Court of Kenya in Francis Kariokor Muruatetu and Others vs. Republic [2017] eKLR had come to the conclusion that although the death sentence is lawful, the mandatory nature of the sentence as prescribed was unconstitutional.

30. Was the life sentence imposed reasonable in the circumstances of the case that was before the trial court? The consistent narrative that ran through the prosecution's case and the defence was that there was a family land dispute that existed in the family. On the fateful morning, the appellant arrived at his mother's house and one of the issues he raised was that he was being fought by his children who demanded part of the family land. When he raised this issue it seemed to annoy his brother the deceased who ordered him to leave. That issue led to the fatal consequences that followed. Upon conviction, the appellant, through counsel, told the Judge in mitigation that he was 69 years old, was a grandfather and father of 6 children; he had grandchildren who were orphans; he was sickly with three broken bones; he was infected with cold; he was remorseful and had been in custody since 2014.

31. The Judge considered all the issues raised in mitigation but also considered that a life was lost at the hands of the appellant; that the victim impact report did not favour him and also considered the brutal manner he ended his brother's life. He concluded;

> ...in the circumstances, I will spare the accused the death penalty but sentence him to life imprisonment. ..."

32. We have considered the evidence before the Judge and mitigation offered and find that the Judge could very well be right in the conclusion he reached. We have also considered the emerging jurisprudence that does not seem to favour indefinite sentences or unknown periods where a person convicted of a

criminal offence may serve. Considering all relevant factors, we think that the appellant is entitled to know how long he will serve in prison after his conviction.

33. In the end, the appeal on conviction fails and is dismissed. We set aside the life sentence awarded and substitute thereof a sentence of twenty-five (25) years imprisonment from 20th November, 2014 when the appellant appeared before the High Court of Kenya at Meru and took plea.

DATED AND DELIVERED AT NYERI THIS 4TH DAY OF JULY, 2025.

S. ole KANTAI

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

ALI- ARONI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR