



REPUBLIC OF KENYA



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**Mutuma & another v Republic (Criminal Appeal 9 & 10 of 2018
(Consolidated)) [2025] KECA 1275 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1275 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 9 & 10 OF 2018 (CONSOLIDATED)
JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA
JULY 4, 2025**

BETWEEN

NICHOLAS MWIRIGI MUTUMA 1ST APPELLANT

FRANKLINE THURANIRA MUTUA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from a conviction and sentence against the Judgment
of the High Court of Kenya at Meru (A. Mabeya, J.) delivered
on 7th December 2017 in H.C. Criminal Case No. 64 of 2011.)*

JUDGMENT

1. The 1st and 2nd appellants were charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* (herein after PC). The offence was said to have been committed between 23rd and 24th November 2011, and the person murdered was Lawrence Kaburu.
2. Both appellants pleaded not guilty to the charges. The prosecution called five (5) witnesses. The brief facts of the case were: PW1 Yusuf Gatobu testified that on the night of 23rd November 2011, he was guarding a house under construction when he saw two people appear and knock at a door about 40 meters away. That was the house where the deceased who was well known to him, was living. PW1 stated that he heard the deceased screaming as the two persons attempted to break the door and the window. He said that he shone his torch on the assailants as they broke the door to the deceased's house and recognized both appellants as persons who were known to him for 10 years. He said that he also spoke to them, asking them to stop what they were doing.
3. The appellants ignored him and instead threatened to uproot the entire house if the deceased did not open the door. PW1 said he heard the deceased open the door and then saw him run out. The appellants



- chased the deceased, caught him and returned him back to his house. They beat the deceased repeatedly outside his house and told him that he would die. PW1 said he clearly saw what the appellants did to the deceased because of electricity lights from a nearby dispensary. He said that he hid because the appellants were armed with pangas and slashers. The two attackers then entered the house and spent two hours inside with the deceased before leaving. He stated that the two appellants removed the deceased from the house and left him on the road. He saw the 1st appellant enter his own home which was next to that of the deceased.
4. PW1 further stated that the following morning, he heard the deceased ask for water and saw a neighbour of the deceased take the water to him and then left. Just then he saw the 1st appellant come out of his house asking why the deceased had refused to die. The 1st appellant entered the deceased house and did not stay long. Shortly thereafter the deceased was found dead.
 5. PW2 Moses Kubania Kigutuki told the court that on the material night, he rescued a child who was wandering at night and after he interviewed the child who was 5 to 6 years old, the child told him that his father had been beaten up by some people. The child led him to the home of the deceased. Outside he saw the two appellants, who were persons he knew from childhood, with the aid of electric light nearby, which lit an area of about five meters. He asked them if they knew Kaburu's home. The two told him that Kaburu was the one making noise inside the house where they were. He peeped through the window and saw the deceased with the aid of a lamp. The deceased did not have a shirt on and was bleeding, but he could not tell where the blood was coming from. The deceased asked the two appellants to forgive him but they said they will not. The deceased then complained that the appellants had injured him and asked to be left alone. PW2 testified that he had not known the deceased previously. He decided to go home with the child after reporting the matter to the Area Manager, who was to call the police. The following morning, he learnt that the deceased had died. He proceeded to the police with the child but was told to keep him until the relatives were found. He later handed over the child to PW3.
 6. PW3 Lawrence Miriti Marangu, the deceased's nephew, identified his uncle's body at the mortuary. He confirmed receiving the child of the deceased from PW2, who called him to pick him up.
 7. PW4 Dr. Kathiri Gacheri produced a postmortem report in reference to the body of the deceased on behalf of a colleague Dr. Makandi, who performed the postmortem. The report confirmed that the deceased died from head injuries sustained from multiple cuts due to assault. PW5 No. xxx CIP Isaac Samoei, the Investigating Officer, received the report of murder in the morning and proceeded to the scene. He found members of the public chasing the appellants. They arrested the 1st appellant whom he rescued from being lynched. He was then guided to where the 2nd appellant was and he apprehended him. He charged both for murder after his investigations.
 8. The 1st appellant gave a sworn defence and put forward an alibi as his defence. He testified that he did not know the deceased or PW1. He was at work on the material day, and had left work quite late on account of rain. The next morning, two police officers found him in his house and informed him that he was required at the police station. They took him with them and locked him in cells without being given any reason. He knows nothing about the offence he was charged with.
 9. The 2nd appellant also gave a sworn defence and put forward an alibi as his defence. He testified that he was at work on the material day up to 6 p.m. when he went home. He walked past where the deceased lived, in the company of one Kinoti with whom he had spent the day. He was arrested at his home on 25th November 2011 and accused of having escaped from prison, which he denied. He denied knowing the deceased and the 1st appellant herein.



10. The 2nd appellant called two witnesses. DW3 Doreen Karambu, his wife, told the court that on the day of the murder, her husband and his friend DW4 went to work as usual and he returned home by 7 p.m. and did not leave again. She insisted that her husband did not commit any murder. DW4 Benson Kinoti Muriungi testified that he had been with the 2nd appellant on the material day and they parted at around 5.30 p.m.
11. In her judgment, the learned Judge held that the prosecution case was well established and there was no reason for the prosecution's witnesses to frame the appellants with the murder of the deceased. He was satisfied that the appellants, with common intention, attacked the deceased, assaulted him and caused his death. Both appellants were convicted of the offence of murder. After considering their mitigation in which it was noted that the appellants were remorseful, the trial judge sentenced them to death, noting that it was the only sentence decreed for the offence of murder.
12. Aggrieved by the decision, the appellants lodged their Notices of Appeal on 14th December 2017. In their separate Memorandum of Appeal, the appellants raised similar grounds of appeal in which the learned trial Judge was faulted on eight [8] grounds. However, having considered these grounds, we find that the issues raised are three: whether the evidence adduced by the prosecution was sufficient to sustain a conviction; whether the prosecution failed to call crucial witnesses; and, whether the sentence imposed was unconstitutional.
13. The appellants proposed to have their conviction quashed and the sentences set aside.
14. At the hearing thereof learned counsel Mr. Muchangi was present for the appellants, while learned Prosecution Counsel Ms. Adhi was present for the respondent. The appellants were present virtually from Embu and Kamiti Maximum Prisons respectively.
15. Mr. Muchangi filed written submissions dated 13th December 2024 and wished to rely on them as well as the list of authorities, and briefly highlight them. Ms. Adhi filed submissions dated 10th December 2024. She relied on them entirely and also highlighted briefly.
16. The appellants, in their written submission, argue that the trial court's decision was based on a flawed assessment of the evidence and a misapplication of legal principles. They contend that the trial judge failed to consider contradictions in the respondent's case, wrongly shifted the burden of proof, and overlooked key evidence, leading to an unjust outcome. They argue that the police ought to have called the child who lived with the deceased and interrogated him, and further, the prosecution ought to have called all crucial witnesses to fill in the critical details on what transpired on that night. The appellants contend that the evidence presented by PW1 amounted to hearsay evidence which is inadmissible as enunciated in the case of *Kinyatti vs. Republic* [1984] KECA 78 (KLR). Further, that they were brought to court only on mere suspicion, and the same ought not to have been the basis of a conviction.
17. With regards to sentencing the appellants relied on the case of *Muruatetu & Another vs. Republic; Katiba Institute & 5 Others (Amicus Curiae)* (Petition No. 15 & 16 of 2015 (Consolidated) [2017] KESC 2 (KLR) (14 December 2017) (Judgment) and submit that from the proceedings and their mitigation; they are first time offenders and were remorseful; in addition the time they have stayed in custody since 2011 they have suffered enough, and have been rehabilitated. Further, the sentence is harsh and excessive. The appellants further rely on the case of *Joseph Kimani Njau vs. Republic* [2014] KECA 229 (KLR) and pray for a non-custodial sentence or a shorter jail term.
18. Ms. Adhi opposed the appeal against conviction and urged that the appellants were positively identified by PW1 who used a torch which was shone on their faces enabling him to see them clearly, and he confirmed that they were persons known to him. She urged that PW1 also spoke with them trying to



talk them out of the attack on the deceased. Counsel submitted that it was clear that both appellants attacked the deceased during the night in question. That the following morning, the deceased was still alive and that the 1st appellant inflicted more injuries on him as a result of which he succumbed and died. Ms. Adhi contended that the death of the deceased was proved and confirmed by the doctor, PW4. The post-mortem results show that the cause of death was head injury due to multiple cut wounds, due to assault. She urged that the appellants' were responsible for causing the deceased's death; t they acted with malice aforethought, which was proved beyond reasonable doubt., The appellants ought to have known that inflicting the injuries they did on the deceased, they were likely to cause death or grievous harm..

19. On the issue that crucial witnesses were not called, Ms. Adhi cited section 143 of the *Evidence Act*. Further she relied on the legal principle affirmed in the case of Joseph Kiptum Keter vs. Republic [2007] KECA 390 (KLR), where it was stated that the prosecution was only obliged to call witnesses who were sufficient to establish the case against the appellants.
20. On the issue of contradictions and inconsistencies in the prosecution's witnesses, the Miss Adhi submitted that there were no contradictions or inconsistencies and even if they were, they are minor and did not go to the root of the case, thus she urged this Court to ignore them. In support she relied on the case of Philip Nzaka Watu vs. Republic [2016] KECA 696 (KLR) and submitted that it is trite that inconsistencies are common in criminal cases due to lapse of memory.
21. In conclusion, therefore, the respondent maintains that based on the evidence on record, and in the circumstances of the case, it discharged its burden and therefore urges the Court to affirm the conviction.
22. On the sentence, learned prosecution counsel submitted that although the appellants mitigated, the trial court noted the same, ultimately it sentenced the appellants to suffer death. The trial judge did so on the belief that its hands were tied. Based on the case of Francis Kariokor Muruatetu & 5 Others (supra) Counsel conceded that this Court should review their sentence and proposed a sentence of 30 years' imprisonment. She placed reliance on the case of Ayako vs. Republic (Criminal Appeal 22 of 2018) [2023] KECA 1563 (KLR).
23. In rejoinder, Mr. Muchangi submitted that if the Court finds that the appellants were still guilty, then it should consider imposing a sentence of 15 years' imprisonment.
24. We are a first appellate Court and our mandate is clear that we have a duty to, as it were, conduct a re-trial, of the case, giving due allowance to the fact that we did not see or hear the witnesses. That was the position adopted by this Court in Jonas Akuno O'kubasu vs. Republic [2000] eKLR where it was held that:

“It is correct that on first appeal the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it ... On second appeal, it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles.”

25. As we stated before, three issues were raised by the appellants, which are whether the evidence adduced by the prosecution was sufficient to sustain a conviction; whether the prosecution failed to call crucial witnesses; and, whether the sentence imposed was unconstitutional.



26. Regarding the issue of whether the evidence adduced by the prosecution was sufficient to sustain a conviction. The appellants' complaint is that the key witness contradicted his evidence in cross-examination when he said the scene was dark, that the appellants passed him at a distance, and he did not witness the appellants beating the deceased and the relied on what he heard from others. The prosecution's position was that the inconsistency in the evidence if any was minor and should be disregarded.

27. There were two key witnesses in this case, both who placed the appellants at the scene of crime. These were PW1 and PW2. This is what the learned Judge said concerning them:

“Both accused have denied having been at the murder scene.

This offence took place at night. However, PW1 was categorical that he saw the accused using a torch which was very powerful because he was guarding a construction site. He had known both accused for a long time. He went close to them and had a conversation with them.

PW1's evidence was corroborated by PW2's evidence who said he was led to Kaburu's house about midnight by Kaburu's child who had fled following the attack on the father; that he found accused 1 & 2 arguing with Kaburu as he begged for forgiveness from them but they declined to forgive him; that both accused were very well known to him and there was a lamp on in the house. PW2 did not however see the accused assault Kaburu but he found Kaburu bleeding. PW2 saw Kaburu and accused at midnight after PW1 had seen them earlier as they assaulted Kaburu.

I am satisfied that the two accused were at Kaburu's house that night and were the ones who assaulted him.”

28. We have considered the evidence of PW2 and find that he went up to the house of the deceased on the night of the incident. He described the light at the scene as an electricity light nearby which lit a radius of 5 meters. He was on a mission to discover who Kaburu was because he wanted to re-unite him with his son. PW2 knew the appellants for 10 years. He discovered that Kaburu was the deceased, then alive, half naked, inside his house and bleeding. He even had a conversation with him concerning the reason for the presence of the appellants at the door of his house. The deceased accused the two appellants of assaulting him and asked them to forgive him and leave him alone.

29. For PW1, said that he had known the appellants before the incident for 10 years. He said that the two passed by his place of work and saw them walk up to the deceased' door; he saw them knocking at the deceased's door, which he estimated to be 40 meters from his work place. He witnessed the unfolding events for a longer period of time, from the arrival of the appellants at the deceased's house armed with a panga and a slasher; the cat and mouse chase outside the deceased's house; his apprehension and beatings outside his house and later inside, evidenced by his cries while in his house. His account of the events of the material night was direct evidence; of what he saw and heard. The complaint that he changed his story is not evident from a close scrutiny of his evidence. He also did not give any hearsay evidence. The learned trial Judge cannot be faulted for the conclusion she arrived at on this point. Nothing turns on this issue.

30. The appellants complained that the investigations into the case were shoddy for reason that the motive for the murder was not given. It was also their position that crucial witnesses were not called as witnesses. These included the neighbours where the deceased lived and the child of the deceased, taken by PW2 on the material night and later handed back to the family.



31. On the question of crucial witnesses not being called to testify, section 143 of the *Evidence Act* answers that concern to the effect that there is no limited number of witnesses required for proof of a matter. This is further buttressed in the locus classicus case of *Bukenya vs. Uganda* [1972] EA 549, where it was held:

“It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

32. We find that the prosecution availed sufficient witnesses to support their case. Given the evidence adduced before the trial court, we do not think that calling as witnesses the child of the deceased and the neighbour would have added any value to the case. Nothing turns on this issue.

33. The appellant made mention of the injuries found on the body of the deceased and, without substantiation, stated that there was no nexus between the injuries on the body of the deceased and the acts of the appellants. The doctor found that death was caused by head injury due to deep cut wounds from assault. The evidence of PW1 was that the appellants were armed with a panga and a slasher. The nature of injuries that the two weapons are capable of causing are consistent with the injuries found on the body of the deceased. We leave it at that.

34. Having re-evaluated and re-analyzed the evidence adduced in this case, there is one important matter we cannot fail to mention and deal with. We do find that the evidence adduced in this case clearly points to the 1st appellant as the one who inflicted the blow that caused the deceased's death. The evidence of PW1 was clear that both appellants attacked the deceased on the material night (23rd November 2011) and left him for the dead. However, PW1 saw him alive the next morning and heard him asking for water which was delivered to him by a neighbor. PW1 saw the 1st appellant alone enter the house of the deceased saying the deceased should die. After that entry is when the deceased was found dead.

35. We find that the learned trial Judge overlooked this evidence. Had she done so, we believe she could have arrived at a different finding, especially in regard to the 2nd appellant. It is clear that the acts of the appellants on the material night did not result in the death of the deceased. The person responsible for that death was squarely the 1st appellant for the attack he executed on the following morning. The 2nd appellant's role was played out on the night before, and that attack can be classified as grievous harm contrary to section 234 of the PC, not murder. Grievous harm is a minor cognate offence to the charge of murder.

36. Black's Law Dictionary 9th Edition page 1186 defines a cognate offence as:

“A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.”



37. This Court in *Robert Mutungi Muumbi vs. Republic* [2015] eKLR discussing the application of section 179 of the *Criminal Procedure Code* (herein after CPC) expressed itself, on the issue, as hereunder:

“As is apparently clear, section 179 of the *Criminal Procedure Code* empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species.”

38. According to the Court:

“To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See *Robert Ndecho & Another V. Rex* (1950-51) Ea 171 and *Wachira S/o Njenga V. Regina* (1954) Ea 398). Spry, J. explained the essence of the first consideration as follows in *ALI Mohammed Hassani Mpanda V. Republic* [1963] Ea 294, while construing the provision of the Tanzania *Criminal Procedure Code* equivalent to section 179 of the Kenya *Criminal Procedure Code*:

“Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence.”

That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial.

The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See *Republic V. Cheya & Another* [1973] Ea 500). In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the *Criminal Procedure Code* even though he was not



charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied.” [Underlining ours].

39. We say no more to the above holding in *Robert Mutungi Muumbi vs. Republic*, (supra). Pursuant to section 179 (1) and (2) of the CPC, the 2nd appellant should have been convicted of the lesser offence of grievous harm, which is a minor offence, which falls short of the offence of murder as no death was caused by the 2nd appellant’s action. This error entitles us to interfere with the conviction of the offence of murder against the 2nd appellant. Accordingly, we set aside the conviction for the charge of murder contrary to section 203 of the PC and in substitution thereof enter a conviction for the offence of grievous harm contrary to section 234 of the PC.

40. The final issue is whether the sentence imposed was unconstitutional. Mabeya, J. on 7th December 2017, delivered himself thus on sentencing:

“ Court

Mitigation has been noted. It is noted that the accused are going [sic] and first offenders.

However, the only sentence decreed for the offence of murder is death.

Accordingly, I sentence the accused's to suffer death as per the law provided. They have 14 days Right of Appeal to the Court of Appeal.”

7/1 2/1 7”

41. We do not wish to belabour the issue of sentence for murder under section 204 of the PC. The Supreme Court in the guiding judgment of *Muruatetu & Another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) put the issue to rest thus:

“ 59. We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of section 204 of the *Penal Code*. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under section 204 of the *Penal Code*, unfair thereby conflicting with articles 25 (c), 28, 48 and 50 (1) and (2)(q) of *the Constitution*.

69. Consequently, we find that section 204 of the *Penal Code* is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.”

42. Having considered the Supreme Court case cited hereinabove and the mitigation given before the trial court, we are persuaded that we are justified to interfere with the trial Court’s sentence of death against the 1st appellant, and sentence him to 30 years imprisonment from the 13th December, 2011 when he first appeared before court.

43. For the 2nd appellant, section 234 of the PC prescribes that a person convicted under that section is liable to imprisonment for life. We sentence the 2nd appellant to 7 years imprisonment from 13th December 2011 when he first appeared before the court.



44. The result of this appeal is that it succeeds in part; for the 1st appellant, the conviction for the offence of murder contrary to section 203 as read with 204 of the PC is dismissed. The appeal against the sentence succeeds as stated herein above.

45. For the 2nd appellant, the appeal against conviction and sentence succeeds in part as demonstrated herein above

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

J. LESIIT

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JUDGE OF APPEAL

ALI- ARONI

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

