**Karube v Republic (Criminal Appeal 12 of 2019)**
**[2024] KECA 284 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KECA 284 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT ELDORET**

**CRIMINAL APPEAL 12 OF 2019**

**F SICHALE, LA ACHODE & WK KORIR, JJA**

**MARCH 8, 2024**

**BETWEEN**

**MONICA IMONI KARUBE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an Appeal against the Judgment of the High court at Eldoret (Kimondo J) delivered on 28th June 2018 in Criminal Case No. 39 of 2012)***

## JUDGMENT

1. Nothing prepared the humble folk of a small desolate trading center in Uasin Gishu County, that goes by the wondrous name of Burnt Forest, for the shock they encountered in the small hours of the 21st of May 2012. One of their neighbours, Daniel Mbugua Githinji had come to an untimely and grisly end. At the end of police investigations into his death his widow, Monica Imoni Karube stood accused.

2. Monica was thus arraigned in court on the information of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on 21st May 2012 at Burnt Forest trading center, Uasin Gishu District of the then Rift Valley Province, she murdered Daniel Mbugua Githinji.

3. The appellant denied the offence and the prosecution called a total of eight (8) witnesses to make their case. At the end of the trial, Kimondo J. convicted her and sentenced her to serve 25 years imprisonment. She was aggrieved by the verdict of the court hence this appeal. We have summarized the case that was before the trial court here below to bring this appeal into perspective.

4. PW1, Githinji Kibe, the father of the deceased rushed to the scene on the night in question, in answer to an urgent call from one Paul Muriuki, PW2 informing him that the deceased had been stabbed with

a knife by his wife (the appellant). PW1 found the naked body of the deceased lying in a pool of blood inside his house.

5. PW2 who had seen the deceased earlier in the evening at about 8:00 pm, had himself been awakened at about 12:30am by another neighbor, (Ruth Wanjiru), and informed that the deceased had cut himself on the hand. He went to the deceased's house where he came upon the body of the deceased lying at the entrance. The appellant was present at the scene. She was crying and cutting off pieces of braids from her head with a knife and dropping them on the ground. That was when PW2 went to fetch his grandfather, PW1 to the scene. The knife was later recovered outside the house when the police arrived at the scene.

6. PW3, Jane Njeri also a neighbor, was awakened on the ill-fated night by the appellant herself and informed that the deceased had stabbed himself. She came out of her house and found the lifeless body of the deceased lying on the ground. The appellant's pink T-shirt and orange and blue flowered skirt were all covered in blood on the front side. From the observation of PW3, there seemed to have been a struggle. She sent her daughter PW6, Monica Wangui Kimani to call Patrick Wango PW5, a step-brother to the deceased.

7. PW4, Chief Inspector Julius Makupe visited the scene at 2:00am on the night of the murder. With the help of the members of the public, he recovered a kitchen knife (exh I), which according to PW3, belonged to the appellant. It lay some 2 to 3 metres away from where the body lay. The appellant was arrested as she tried to flee from the scene. PW5, Patrick Wango rehashed the evidence of PWI, PW2 and PW3 and confirmed that the appellant tried to flee from the scene towards the gate before she was arrested and the knife recovered 2 to 3 metres outside the house.

8. PW7, Dr. Walter Nailanya the government pathologist based at Moi Teaching and Referral Hospital performed a post mortem examination on the body of the deceased on 24th May 2012. He found a stab wound on the left upper chest close to the shoulder joint measuring 3x1 cm. The wound extended to the upper left side of the chest cavity and was filled with blood. The entry point of the wound was at the front. He also found multiple bruises on both upper limbs. In the opinion of the pathologist, death resulted from severe bleeding but he could not tell whether or not the wound was self-inflicted

9. PW8, Corporal Joel Nandoya visited the scene on the night of the murder with his boss PW4. He testified to the presence of blood and signs of struggle outside the house where the body was found. Upon interrogation the appellant claimed that the deceased stabbed himself but she did not give any reasons why he did so. With the assistance of the public, they recovered the blood-stained white stainless steel knife. He called a Scenes of Crime officer to take photographs of the scene before he arrested the appellant and later prepared an Exhibit Memo for D.N.A. sampling.

10. At the close of the prosecution case the appellant was placed on her defence. She was represented by M/S Angu Kitgin advocate. In her sworn testimony she admitted having been involved in a struggle with the deceased, but she maintained that the deceased stabbed himself.

11. Upon considering the evidence the learned trial Judge Kimondo J, found the appellant guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He convicted her and on 31st May 2018, sentenced her to serve 25 years imprisonment. The appellant was dissatisfied with the judgement of the court and appealed to this Court against both conviction and sentence.

12. In his appeal the appellant alleges that the learned trial Judge erred in law and in fact on several grounds. First, that he convicted the appellant without proof of malice aforethought. Secondly, that he rejected the appellant's defence 'wholesomely' when it was plausible and not an afterthought. Thirdly, that he disregarded the period of 7 years the appellant spent in custody, which ought to have been deducted

from her sentence. Fourthly, that he relied on uncorroborated circumstantial evidence to convict the appellant. Lastly, that the sentence meted upon the appellant was excessive and in disregard of her plea that she is a single mother of an eight years old girl, who lives with the appellant's aged mother.

13. The case was disposed of by way of written submissions. M/S Angu Kitgin & Company Advocates filed submissions dated 15th June 2023 on behalf of the appellant. Counsel urged that the trial Judge concluded that the circumstantial evidence presented in the case unequivocally pointed to the guilt of the appellant, leading to a finding of premeditated homicide. That the learned Judge dismissed the arguments of the defence as farfetched and lacking credibility. Counsel challenged the foregoing conclusions on several grounds which we set out here below.

14. Counsel argued firstly, that the evidence provided by the investigating officer was contradictory and unreliable, particularly regarding the testimony about the couple's unresolved issues and the deceased's behavior while intoxicated. The appellant pointed out that the absence of the government analyst's report, which would have provided crucial evidence regarding the state of the deceased's intoxication and the entry point of the knife used in the incident, left a significant gap in the prosecution case. The appellant relied on the cases of Abanga alias Onyango v. Republic CR. App NO. 32 of 1990(UR), Sawe Vs. Republic [2003] KLR 364 and Mwangi and Another v Republic [2004] 2 KLR 32 for this assertion.

15. Secondly, the appellant submitted that failure to produce the analyst's report weakened the prosecution's case, since there was no other independent corroborating evidence. She asserted that circumstantial evidence alone cannot suffice and must be supported by independent material evidence. To fortify her argument, she relied on the case of Regina v Exall and others (1866) 176 ER 850.

16. Thirdly, the appellant argued that the prosecution did not sufficiently challenge her claim of self defence, in light of certain aspects such as the deceased's history of binge drinking and violent behavior after drinking. That the testimony of PW8 supports her contention that the deceased had a history of violent altercations with the appellant. She urged the Court to reconsider the verdict on the basis of these factors.

17. Lastly, the appellant urged the Court to independently evaluate the evidence and reconsider the harshness of the sentence imposed, especially given her young age and lack of prior criminal record. She urged the Court to reduce the sentence or release her on the time served.

18. Mr Mark Mugun, Senior Prosecution Counsel in the office of the DPP filed submissions dated 12th July 2023 on behalf of the respondent and opposed the appeal on both conviction and sentence. Counsel asserted that the circumstantial evidence overwhelmingly inculpated the appellant. That the element of malice is discernible from the choice and manner of weapon employed, and that the appellant's defense was effectively rebutted by the prosecution's evidence. Further that the sentence imposed adhered to statutory guidelines.

19. Counsel condensed the appellant's contestations on various grounds into two primary issues: the sufficiency of evidence and the alleged excessiveness of the sentence.

20. On the sufficiency of evidence, counsel referred to the case of Anthony Ndegwa Ngari v Republic (2014) eKLR, to argue that the criteria essential for establishing guilt in a murder case includes proof of the fact and cause of death, its linkage to an unlawful act, attribution to the accused, and demonstration of malice aforethought. Counsel contended that circumstantial evidence, notably the presence of blood on the appellant's attire and her attempt to flee the crime scene, incontrovertibly inculpated her. He referred to the case of George Karania Mwangi v Republic (1983) eKLR to underscore the

stringent standards required where reliance is placed on circumstantial evidence and asserted that the evidence adduced in the present case met the criteria.

21. Counsel then relied on the cases of NMW v Republic (2018) eKLR and Morris Aluoch v Republic (1997) eKLR to state that malice aforethought had been established. He urged that the choice of weapon, method of infliction, and subsequent conduct of the appellant collectively evince premeditation and intent. Further that the appellant's flight from the scene was indicative of guilt and was antithetical to her innocence. He cited the case of Kennedy Wesonga Kwoba v Republic, (2013) eKLR to buttress this argument.

22. On the sentence, counsel underscored the gravity of the offence and stated that the penalty provided under Section 204 of the Penal Code is the death sentence, but the trial court opted for a 25-year imprisonment term after considering the appellant's plea for leniency. Drawing on the case of Bernard Kimani Gacheru v Republic, [2002] eKLR, counsel emphasized that while the discretion on sentence rests with the trial court and must be tailored to the facts of each case, appellate courts may interfere if the sentence is manifestly excessive, or the trial court overlooked material factors, or if wrong considerations influenced the decision. Counsel contended that the sentence imposed in this instance was within the bounds of the law.

23. Counsel submitted further, that even if the appellate court perceives the sentence to be weighty and might not have imposed it itself, this fact alone does not suffice to warrant interference with the trial court's sentencing discretion. He urged that the appellant failed to show how the sentence was manifestly excessive, or was based on incorrect considerations. He however, acknowledged that the court did not take into account the appellant's time spent in remand, as mandated by Section 333(2) CPC and reluctantly conceded the appeal on sentence, but solely in consideration of the time spent in custody awaiting trial.

24. In conclusion, counsel urged the Court to dismiss the appeal against conviction and on the sentence the period spent in custody awaiting trial be factored into the final sentence.

25. Having considered the grounds of appeal, the submissions thereon, the record and the law applicable, the paramount issues that arise for determination are whether the prosecution proved the guilt of the appellant beyond reasonable doubt and whether the sentence imposed was manifestly harsh and excessive.

26. This is a first appeal and our mandate as was aptly set out in the case of Okeno vs. Republic [1972] EA 32, is as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. R. [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424."

27. We have therefore, considered the rival arguments before us in light of the expanse of our mandate as set out above. The beginning point is Section 203 of the Penal Code under which the appellant was charged and which provides as follows:

> " Section 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

28. For this conviction to be sound under Section 203 of the Penal Code therefore, the prosecution was required to prove beyond reasonable doubt, that it was the appellant who, by an unlawful act or omission, caused the death of the deceased and that she did so with malice aforethought.

29. In regard to the occurrence and cause of death, there was unanimous acknowledgment of the deceased's demise on that particular night and in that particular place, as testified to by all the witnesses. The occurrence of death was confirmed by the post mortem report produced by PW7, the government pathologist. Thus, this element was proved beyond reasonable doubt.

30. As to whether the death stemmed from an unlawful act or omission, the examination conducted by PW7 revealed that the deceased incurred a fatal stab wound on the left upper chest, close to the shoulder joint and it measured 3x1cm. The wound extended into the upper left side of the chest cavity and it had blood in it. There were also multiple bruises on both upper limbs. His opinion was that death resulted from severe bleeding. Therefore, it was firmly established that the demise of the deceased resulted from an unlawful act.

31. On the identity of the perpetrator, there was no dispute that the appellant was with the deceased in his last moments. None of the prosecution witnesses however, witnessed the commission of the act that caused his death. The prosecution's case on what transpired just before the deceased's life was snuffed out was predicated on circumstantial evidence. We therefore, tested the analysis of the learned trial Judge to establish whether he examined the evidence of the surrounding circumstances properly to establish that it was sufficient to prove that the appellant inflicted the fatal wound and that the deceased was not the author of his own misfortune as stated by the appellant.

32. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR, the Court of Appeal stated as follows concerning placing reliance on circumstantial evidence:

> "However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -
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> "It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

33. In the same case of Ahamad Abolfathi Mohammed supra, the Court of Appeal outlining the criteria for assessing whether circumstantial evidence presented in court can uphold a conviction stated thus:

> " Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the subject person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions as follows:
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> > '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;
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> > (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the ubject;
> >
> > (iii) the circumstances taken cumulatively, should from 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 none else.'"

34. The appellant stated that the deceased had a history of binge drinking and violent behavior after drinking. Additionally, that the absence of the government analyst's report, to provide crucial evidence regarding the deceased's state of intoxication and the entry point of the knife used in the incident, left a gap that should have been considered to the appellant's benefit. The respondent on the other hand contended that the presence of blood on the appellant's attire and her attempt to flee the crime scene incontrovertibly inculpated her.

35. We examined the circumstantial evidence in this case to establish whether the trial Judge was right in concluding that it pointed irresistibly towards the guilt of the appellant.

36. First, we noted that outside the house where the body of the deceased was found, there were clear signs of a struggle substantiated further by multiple bruises found on both upper limbs of the deceased. The appellant admitted in her evidence that she engaged in a struggle with the deceased prior to the fatal injury. Her testimony was as follows:

> "We got into an argument over his drinking. He woke up. He returned with a knife. He started cutting my hair piece. He was beating me. The knife cut me on face and fingers. We struggled for the knife, I noted he was bleeding. I screamed. He was bleeding a lot."

37. However, it is notable that none of the neighbours heard the appellant scream and the injuries on the upper extremities of the deceased were classic defensive wounds suggesting that he was defending himself rather than attacking his opponent. Further, the evidence of PW8 was that no cuts or wounds were observed on the appellant's face or fingers, at the time of arrest as she alleged.

38. Secondly, the appellant submitted that the prosecution did not sufficiently challenge her claim of self defence. That the deceased attacked her and cut her braids from her head with a knife. We noted however, that when PW2 arrived at the scene he found the appellant holding the blood-stained knife in her right hand and was using it to chop off the braids from her own head and dropping them on the ground. This negates her evidence that the deceased attacked her with a knife and cut off her hair

pieces and indicates that the appellant was laying a basis for a defence of self defence. Section 17 of the Penal Code provides as follows on self-defence:

> "Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law."

39. The Court of Appeal in Ahmed Mohammed Omar & 5 Others V. Republic [2014] eKLR held as follows on the application of principles of English Common Law in cases of this nature:

> " What are the common law principles relating to self defence? The classic pronouncement on this issue and which has been severally cited by this Court is that of the Privy Council in PALMER v R [1971] A.C. 814. The decision was approved and followed by the Court of Appeal in R v McINNES 55 Cr. App. R. 551. Lord Morris, delivering the judgment of the Board, said:
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> > "It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. .....Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence.....
> >
> > The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury."

40. The Court went further to discuss several cases among them Robert Kinuthia Mungai –vs- Republic (1982-88) 1 KAR 611, Beckford –vs- R [1987] 3 ALL ER 425, DPP –vs- Morgan [1975] 2 ALL ER 347, R –vs- Williams [1987] 3 ALL ER and came to the following conclusion in regard to the aforesaid principles:

> " The common law position regarding the defence of self- defence has changed over time. Prior to the decision of the House of Lords in DPP v MORGAN [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds..... It is acknowledged that the case of DPP v MORGAN (Supra) was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability

where the defence of self-defence is raised from an objective test to a subjective one. See also SMITH AND HOGAN'S CRIMINAL LAW, 13th Edition, Page 331.....

.....Just as the Privy Council did in BECKFORD v R (Supra), we must also dispel the fear that "the abandonment of the objective standard demanded by the existence of reasonable grounds for belief will result in the success of too many spurious claims of self- defence." Each case will have to be determined on its own merit and peculiar circumstances....."

41. The Court of Appeal in the foregoing case placed reliance on Beckford V. R (Supra) and held that:

> ".....If self-defence is raised as an issue in criminal trial, it must be disproved by the prosecution. This is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the accused was unlawful."

42. In the instant case PW2 observed that the body of the deceased was lying naked while the appellant was fully dressed and the front part of her clothes was covered in blood. That she discarded the knife she was holding when other people arrived on the scene and it was later recovered some 2 to 3 metres away. According to PW4, PW5, and PW8, the appellant tried to flee from the scene when the police arrived.

43. When the foregoing details of circumstantial evidence are taken cumulatively, they form a chain so complete that there is no escape from the conclusion that within all human probability, the fatal injury on the deceased was inflicted by the appellant and no one else We therefore have no basis to depart from the conclusion of the learned trial Judge that the circumstantial evidence presented in the case unequivocally pointed to the guilt of the appellant.

44. The question that follows is whether the injury was inflicted with malice aforethought. Malice aforethought connotes the mens rea, or the intention to kill another person. Section 206 of the Penal Code defines it as follows;

> " 206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances
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> a. an intention to cause the death or to do grievous harm to any person, whether that person is the person actually killed or
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> 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;"

45 . Malice aforethought does not only exist where the act was planned or premeditated. The manner in which the act resulting in death was committed can itself lead to the conclusion that there was malice aforethought.

46. The post mortem report by PW7 revealed that the deceased herein sustained a fatal stab wound on the left upper chest, close to the shoulder joint measuring 3x1cm. The wound extended into the upper left side of the chest cavity and had collected blood in it. The pathologist attributed death to severe bleeding. In our considered view, the choice of weapon being a sharp kitchen knife, the force used to inflict the injury and the part of the body the appellant chose to sink the knife into being the chest

cavity, left no doubt that it was intended to cause death, or at the very least grievous harm. We therefore, find that the learned Judge was right to find that malice aforethought was proved.

47. Lastly, the appellant submitted that the sentence of 25 years in prison was manifestly harsh and excessive, especially given her young age and lack of prior criminal record. She urged the Court to consider the time she had spent in custody in total and reduce the sentence or release her altogether. In rebuttal counsel for the respondent urged the Court to consider the gravity of the offence and the fact that the penalty provided under Section 204 of the Penal Code is the death sentence. That the trial court opted for a 25-year imprisonment term after considering the appellant's plea for leniency.

48. Indeed, Section 204 of the Penal Code provides that:

> " 204. Any person who is convicted of murder shall be sentenced to death."

49. The Supreme Court in Francis Karioko Muruatetu & Another vs Republic [2017) eKLR, gave the following guidelines with regard to mitigating factors applicable in a hearing for sentence purposes upon conviction on a murder charge:

> 71. As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:
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> a. age of the offender;
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> b. being a first offender;
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> c. whether the offender pleaded guilty;
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> d. character and record of the offender;
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> e. commission of the offence in response to gender- based violence;
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> f. remorsefulness of the offender;
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> g. the possibility of reform and social re- adaptation of the offender;
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> h. any other factor that the Court considers relevant.
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> 72. We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process."

50. We note that upon conviction the appellant's mitigation was considered and she was treated as a first offender. She was thus, sentenced to 25 years imprisonment. On the other hand, the deceased suffered a vicious stab wound which claimed his life that was also young. We are therefore of the considered view that the sentence of 25 years imprisonment was fair in the circumstances of this case.

51. Consequently, we find that the appeal is lacking in merit and is hereby dismissed on conviction. On sentence we order that the sentence shall run from the date of the appellant's arrest.

**DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.**

**F. SICHALE**

**.....**

**JUDGE OF APPEAL**

**L. ACHODE**

**.....**

**JUDGE OF APPEAL**

**W. KORIR**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**