



REPUBLIC OF KENYA



**KENYA LAW**  
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**Fwamba v Republic (Criminal Appeal E018 of 2021)  
[2024] KECA 916 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 916 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CRIMINAL APPEAL E018 OF 2021  
F SICHALE, FA OCHIENG & WK KORIR, JJA  
JULY 26, 2024**

**BETWEEN**

**DISMAS SIKUKU FWAMBA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Bungoma (W. Karanja J (as she then was)), dated 26th May 2009 in High Court CRA NO. 27 of 2005)*

**JUDGMENT**

1. The appeal before us is first appeal in which Dismas Sikuku Fwamba (the appellant herein), was charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) cap 63 of the Laws of Kenya.
2. The particulars of the offence were that between 16<sup>th</sup> and 21<sup>st</sup> March 2005, at Musemwa village, Sitabichi sub-location, Malakisi location, in Bungoma District within the then Western Province, jointly with others not before court murdered Alexander Masinde Kasisi (hereinafter the deceased).
3. The appellant was tried and convicted of the offence and sentenced to death. Being aggrieved with the aforesaid conviction and sentence, the appellant filed this appeal vide a Notice of Appeal dated 4<sup>th</sup> June 2009 and a Memorandum of Appeal dated 16<sup>th</sup> June 2023, in which he raised 6 grounds of appeal as follows:
  - “ a). That the Learned Judge erred in failing to observe that the identification of the appellant did not meet the legal threshold.
  - b. That the Learned Judge erred in convicting the appellant on the basis of weak evidence.



- c. That the Learned Judge erred in failing to consider the appellant’s mitigating circumstances before sentencing him.
  - d. That the learned judge erred in law by failing to consider that delays and inconsistencies in carrying out the death sentence amount to cruel and degrading treatment.
  - e. That the analysis of the law by the learned judge was incomplete, defective and prejudicial to the appellant.
  - f. That the conviction and sentence are wholly unsafe and ought to be quashed/ set aside.”
4. The appeal was canvassed by way of written submissions dated 16<sup>th</sup> June 2023 for the appellant and 30<sup>th</sup> October 2023, for the respondent which were briefly orally highlighted by Mr. Oyaro learned counsel for the appellant and Ms Limo for the respondent during the plenary hearing on 4<sup>th</sup> December 2023.
  5. It was submitted for the appellant the main issues in this appeal were whether appellant was properly identified and the whether the sentence imposed was legal and appropriate.
  6. Turning to identification of the appellant, it was submitted that the appellant was not properly identified since the witness who claimed to identify him (PW1), did not clearly state how he identified him and the court over relied on a dying declaration that was equally wanting in detail.
  7. It was further submitted that it had been demonstrated by the testimony of the prosecution witnesses that the appellant had a very close relationship with the deceased and was the one who attended to the deceased despite the fact that his own children were not too far away.
  8. It was thus submitted that the deceased could have been mistaken in his identification of the appellant as one of his assailants and that the deceased may have merely pointed at the appellant and his co accused because they had raised concerns over his actions in the community.
  9. It was further submitted that the appellant was not accorded a fair hearing as he was arrested 16 days before arraignment in court and that this was a violation of his Constitutional rights.
  10. Lastly, on sentencing, it was submitted that the learned judge made no effort whatsoever to hear the appellant’s mitigating circumstances as she simply read out her judgment and in the last paragraph, pronounced sentence and that the Supreme Court had recently declared in the landmark decision of *Francis Karioko Muruatetu & another v. Republic* [2017] eKLR that the mandatory nature of the death sentence under Section 204 of the Penal Code was unconstitutional for failing to take into account mitigating circumstances.
  11. On the other hand, it was submitted for the respondent that all the ingredients for the offence of murder were proved to the required standard. Regarding identification of the appellant, we were urged to find that the evidence presented was direct and buttressed by the dying declaration of the deceased as per Section 33 (a) of the *Evidence Act*.
  12. It was submitted that PW1 had categorically stated that he had identified the appellant with the help of a spotlight and moonlight which were bright enough to sufficiently recognize the appellant. Further, that the appellant was well known to PW1 by virtue of being a neighbour and a “mukhwasi” (meaning in-law) and that both the deceased and PW1 were quite familiar with the appellant and that was why PW1 easily recognized the appellant’s voice when he called him that same night.



13. It was thus submitted that PW1's identification of the appellant was thus both voice and visual identification and that further the murder weapon (rungu) was also properly identified as that of the appellant as he was seen with it by both the deceased and PW1 at the time of assault. It was therefore submitted the identification herein was based on recognition by reason of long acquaintance and that there was no better mode of identification than that. For this proposition, reliance was placed on the case of *Karaton V Ole Lesarau V Republic* [1988] eKLR.
14. It was further submitted that the deceased who was the father in-law to the appellant knew him very well and that was why he was able to identify him that fateful night as his assailant and he relayed the same information to PW1, PW2, PW3 and PW4.
15. Turning to the alleged violation of the appellant's Constitutional rights, it was submitted that this issue was never raised in the trial court. Further, that the appellant was tried under the retired Constitution and therefore this issue did not arise.
16. On sentencing, it was submitted that the death sentence was legal and that the deceased met his death in a grisly manner having been murdered on a wild allegation of blocking rain. The appellant led the pack in surrounding the deceased's house, breaking in, ambushing and clobbering him while in his bed sleeping by a person he had trusted and who often took care of him.
17. Consequently, we were urged not to disturb the sentence.
18. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a first appeal, this Court is mindful of its duty as a first appellate Court. This duty was well articulated by this Court in *Erick Otieno Arum v Republic* [2006] eKLR as follows:

“It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e.) a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same”
19. A brief analysis of the evidence in the trial court is however necessary so as to reach our own independent conclusion on the guilt or otherwise of the appellant. The evidence before the trial court was as follows:
20. Linus Wangila Masinde testified as PW1. It was his evidence that on 16<sup>th</sup> March 2005, he was at home having come from Malakisi when he met one Barasa (the appellant's co-accused in the trial court), who informed him that he had been told by the appellant that the deceased who was his father, was the one making rain to disappear.
21. He further testified that on the same day while sleeping, he heard a big bang on the deceased's door and he went outside and saw spotlights being shone around. That, as he approached the house, he saw many people surrounding the house and he started crawling towards them and when he drew near, a spotlight was shone towards the appellant accidentally and he saw him armed with a rung.
22. That, he got scared and went back to his house and hid and told his wife to say that he was not there if anybody asked for him. That later on, he heard somebody call him “mukhwasi” (in-law) and he recognized the voice to be that of the appellant. His wife told the appellant that PW1 had left.



23. He later heard footsteps and heard the deceased calling him telling him that he had been attacked. He also heard many footsteps but he could not go outside for fear of his life.
24. The following morning, he went to the deceased's house in the company of his brother and they found him badly injured and when they asked him who had attacked him, he told them that he had seen the appellant and one Barasa. They later called the assistant chief and the deceased repeated the same allegation that he had been attacked by the appellant and one Barasa.
25. Peter Wambuke testified as PW2. He testified that on 17<sup>th</sup> March 2005, he was in the shamba when the deceased's wife called him and told him that the deceased had been attacked that night. He then went to the deceased's house where he found the deceased in critical condition. The deceased told him that he had been attacked by many people but he had identified Ben Kisiangani and Paul (the appellant). They later called the assistant chief and the matter was reported to the police.
26. Pius Wataka Masinde testified as PW3. It was his evidence that the deceased was his father and that on 16<sup>th</sup> March 2005, he was going to the deceased's house when he met the deceased who told him that the appellant and his co-accused had threatened to kill him saying he was chasing away the rain.
27. That later on, he found the deceased in bed injured and his body was swollen all over and he had a broken arm and on checking the house, he saw a rungu which he knew belonged to Sikuku (the appellant), who was a neighbour. The deceased then informed him that he had been beaten by Paul (the appellant) and Ben and that further the deceased gave the said names to the chief in his presence. They later took the deceased to hospital where he died.
28. PW4 was PC Albert Nyangweso then attached to Malakisi police station. It was his evidence that on 17<sup>th</sup> March 2005, he was told by the OCS that there was an emergency assault case involving the deceased. That, in the company of his colleagues, he proceeded to the deceased's home and found him lying on his bed and he complained that on 16<sup>th</sup> March 2005, he had been attacked by a group of people who were claiming that he was the one blocking the rain.
29. That upon interrogation, the deceased told him that he had identified Ben Kisiangani and Dismas Sikuku (the appellant) as some of the attackers. He could not take the deceased's statement as he had to seek treatment first. They later arrested the appellant and recovered a rungu from PW3, who told them that it was recovered from the deceased's house. The deceased unfortunately died before he could record his statement.
30. Fred Simiyu testified as PW5. It was his evidence that the deceased was his father and that on 23<sup>rd</sup> March 2005, at Bungoma District Hospital, he witnessed a post mortem examination in respect of the body of the deceased. He further testified that earlier on i.e. on 12<sup>th</sup> March 2005, the deceased had told him that one Kisiangani had told him that he was the one blocking the rain.
31. Edward Wafula testified as PW6 and was the deceased's son. He testified that he was with the deceased when he passed on on 21<sup>st</sup> March 2005. The deceased had told him before he died that he had been injured by Paul (the appellant) and one Ben Kisiangani.
32. Mary Nambuya testified as PW7 and was a wife to the deceased. It was her evidence that on 17<sup>th</sup> March 2005, she had gone to the deceased's house and found him crying and on enquiry, the deceased told her that he had been assaulted by a group of people and he had managed to identify 2 of those people who had attacked him namely: Paul Sikuku (the appellant) and Ben Kisiangani. It was her further evidence that she saw a rungu at the scene which she knew belonged to the appellant.



33. Dr. Benard Oburu Orege testified as PW8. He produced a post mortem report dated 23<sup>rd</sup> March 2005, in respect of the deceased. Externally, the body had bruises on the chest with ecchymosis on the abdomen, there was a fracture of right humerus upper 1/3 and there were no penetrating injuries.
34. Internally, there was fracture of the rib number 8 on the right side, the right lung was torn and collapsed and there was no fluid in the cavity. The heart, spleen and the other systems were normal. He formed the opinion that the cause of death was cardio pulmonary arrest due to hypoxia secondary to pneumothorax due to blunt chest injury.
35. PW9 was Levi Masika the assistant chief Malakisi sub location. He gave similar evidence as PW1, PW2, PW3, PW4, PW6, and PW7 and testified that the deceased had told him that he had identified the appellant and Ben Kisangani as his attackers.
36. PW10 was Sergeant Vincent Juma Sikuku then attached to Malakisi police station. He testified that on 23<sup>rd</sup> March 2005, he had attended the post-mortem of the deceased and later on he went to the scene of crime and drew a sketch plan.
37. The appellant in his defence gave a sworn statement and testified that he was arrested on 18<sup>th</sup> March 2005, by 2 police officers and taken to Malakisi police station where he stayed for 16 days before being eventually charged with the offence of murder.
38. Having carefully gone through the record, and the rival submissions by the parties, we consider the facts and issues in this appeal to be rather straightforward. Consequently, we have framed the following 3 main issues for our determination:
  1. Whether the identification of the appellant was proper?
  2. Whether the appellant's rights to a fair trial were violated?
  3. Whether the sentence imposed on the appellant was legal and appropriate?
39. Turning to the first issue and as to whether the appellant was properly identified, PW1 squarely placed the appellant at the scene of crime. His evidence was that on 16<sup>th</sup> March 2005, he was coming home from Malakisi when he met the appellant's co-accused who told him that he had been called by the appellant who told him that the deceased was the one making rain to disappear.
40. That later on while sleeping in his house, he heard a big bang on the deceased's house and when he went outside he saw spotlights being shone around and as he approached the house, he saw many people surrounding the house. As he drew near a spotlight was shone towards the appellant whom he saw. The appellant was armed with a rungu.
41. It was his further evidence that he got scared and went back to his house and told his wife to say that he was not around in case anyone asked for him. Moments later, he heard somebody calling him "mukhwasi" which means in-law and he recognized the voice to be that of the appellant. He later heard the deceased calling him out saying he was being attacked but he could not get out as he was scared.
42. The following morning, he went to the deceased's house with his brother and when they asked the deceased who had attacked him, the deceased told them that he had seen one Barasa and the appellant.
43. PW1's evidence in this regard remained largely unchallenged even under cross examination when he stated thus:

"I was able to see Dismas's face clearly. They were approximately 8 people. The rungu in court is the one that was used to break my father's door. I said to the police that Dismas called



me “mukhwasi” that night. ‘.....My father told us that he was only able to identify 2 of his attackers. He said he saw them using their spotlights...’

44. PW1’s evidence that he saw the appellant that fateful night was corroborated by the statement by the deceased to PW1 that one Barasa and the appellant were among those people who had attacked him.
45. It is also not contested that the deceased, the appellant and PW1 were well known to each other as they were neighbours and the appellant even used to assist the deceased with domestic chores.
46. It is also not in dispute that the incident happened at night and the conditions therefore might not have been favourable for a positive identification/ recognition. Be that as it may, and was rightly held by the trial judge, this was a case of both voice and visual recognition.
47. It has been stated time and time again that voice identification is just as good as visual identification. In *Karani - v- R* [1985] KLR 290 this Court rendered itself thus:

“Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification.”
48. Further, in *Choge v R* [1985] KLR 1, it was stated thus:

“.....There can be no doubt that the evidence of voice identification is receivable and admissible in evidence and that it can, depending on the circumstances carry as much weight as visual identification, since it would be identification by recognition rather than at first sight. In *Rosemary Njeri v Republic* [1977] Criminal App. No. 27, a victim of the offence of grievous harm testified she heard the appellant say ‘break her legs’. The reception of this evidence was upheld in the High Court on the first appeal and also on the second appeal in which this Court said: ”
49. From our own assessment and re-evaluation of the evidence of voice recognition, we are of the considered opinion that the calling out of PW1 by the appellant namely: “mukhwasi” coupled with the visual identification rule out the possibility of mistaken identity.
50. Turning to the issue of the dying declaration, the court was faulted for over relying on the dying declaration that was wanting in detail. It was submitted that the appellant had a very close relationship with the deceased and that the deceased could have been mistaken in his identification of the appellant as one of the assailants.
51. PW1, PW2, PW3, PW4, PW6 PW7 and PW9 all testified that the deceased had told them before he died that the appellant and one Ben were among the group that had attacked him on 16<sup>th</sup> March 2005. The evidence of these particular witnesses remained largely unchallenged even under cross examination.
52. There is no doubt that the statement by the deceased, to these witnesses that the appellant and one Ben were among those people who attacked him was a dying declaration within the meaning of Section 33 (a) of the *Evidence Act* cap 80 of the Laws of Kenya.



53. In the case of *Philip Nzaka Watu v Republic* [2016] eKLR, this Court set out the principle of admissibility of a dying declaration as follows: -

“Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. .... While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

54. Applying the tests laid out in the above case in the appeal before us, can it be said that the learned judge fell into error by relying on the deceased’s dying declaration? We think not as the learned judge in a well-reasoned judgment warned herself of the dangers of relying on a dying declaration and gave reasons as to why she accepted the same when she stated thus in her judgment:

“In accepting dying declarations as being capable of convicting on, the court must treat the same with a very high degree of circumspection. In this case, I do not find it difficult to accept and convict on the dying declaration as regards accused 1. I say so because, the declaration has already been corroborated by other independent and strong evidence of identification. My finding therefore is that the prosecution has proved beyond any shadow of doubt that the 1<sup>st</sup> accused was in the group which assaulted and thus killed the deceased. I will revisit the issue of mens rea later.”

55. The juristic theory regarding the acceptability of a dying declaration is that such a declaration is made in extremity when the party is at the point of death and when every hope in this world is gone and when every man is induced by the most powerful consideration to speak the truth only.

56. In the instant case, there was strong and reliable evidence that the deceased was very close to the appellant and the appellant even used to help him sometimes with domestic chores. In our considered opinion therefore, the deceased would have no reason to frame the appellant by stating that the appellant was among those who attacked him that fateful night and the learned judge was therefore right in accepting the deceased’s dying declaration.

57. Additionally, both PW3 and PW7 testified that the rungu that was found in the deceased’s house belonged to the appellant and this piece of evidence remained largely uncontested.

58. In the instant case and the identification of the appellant having been 3 pronged namely; by visual identification, voice recognition and the deceased’s dying declaration we are satisfied that the appellant was properly identified and was among those people who attacked the deceased on the night of 16<sup>th</sup> March 2005. Consequently, we find no merit in this ground of appeal which we dismiss in its entirety.

59. Additionally, the contention by the appellant that the analysis of the law by the learned judge was prejudicial to him was clearly without any basis. The learned judge for example gave clear reasons why she acquitted the appellant’s co-accused when she stated inter alia that the evidence of voice recognition or visual identification did not touch on the appellant’s co-accused and PW1 categorically stated that



he did not see the appellant's co accused at the scene. Further, the evidence of the dying declaration against the appellant's co-accused was not corroborated.

60. The learned judge was further faulted for failing to note that the appellant's Constitutional rights were violated as he was detained in police custody for 16 days before being arraigned in court. We have gone through the record and note that despite the appellant being represented, he only raised this issue at the tail end of the proceedings during the defence hearing. Whereas we are sympathetic to the appellant, his only recourse if any lies elsewhere but not in this Court. See the case of *Ezekiel Oramat Sonkoyo v. Republic* [2012] eKLR, where this Court stated thus:

“Applying the above principle to the instant case, I hold the considered view that the breach complained of by the appellant at this stage cannot be undone, and accordingly the appellant can only be compensated for that breach by way of damages. The appellant's block of grounds of appeal based on the issue of breach must therefore fail.”

Consequently, nothing turns on this point.

61. Accordingly, we find the appellant's conviction for the offence of murder to be safe and sound, which conviction we hereby affirm.
62. On the issue of sentence, the appellant was sentenced to death as provided for pursuant to the provisions Section 204 of the *Penal Code* cap 63 of the Laws of Kenya. The sentence that was meted on him was therefore legal. Be that as it may, the Supreme Court of Kenya in the case of Francis Karioko Muruatetu (supra) held that the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code was unconstitutional as it fetters the discretion of the Court to award an alternative sentence in an appropriate case. The Court did not however disturb the validity of the death sentence.
63. We have considered the circumstances under which the offence was committed. There is no doubt that the offence is serious. Additionally, the deceased was murdered on the guise of frivolous, trivial and preposterous allegations that he was the one making the “rain to disappear.” We further note that the appellant was not accorded a chance to mitigate. Considering the period that the appellant has spent in custody, we are inclined to exercise our discretion to reduce his sentence.
64. Accordingly, we set aside the sentence of death that was meted out on the appellant and substitute the same with a sentence of 30 years' imprisonment to run from the date he was arraigned in Court on 8<sup>th</sup> April, 2005 pursuant to Section 333(2) of the *Criminal Procedure Code* Cap.75 of the Laws of Kenya.
65. The appellant's appeal only succeeds to that extent.

It is so ordered.

**DATED, SIGNED & DELIVERED AT NAKURU THIS 26<sup>TH</sup> DAY OF JULY, 2024.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**W. KORIR**



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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

