



**Koros v Republic (Criminal Appeal 55 of 2017)  
[2024] KECA 1519 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1519 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 55 OF 2017  
M NGUGI, FA OCHIENG & WK KORIR, JJA  
OCTOBER 25, 2024**

**BETWEEN**

**COSMAS KIPYEGON KOROS ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Bomet  
(M. Muya J.) dated 31st May, 2017 in Bomet HCCR No. 22 of 2016)*

**JUDGMENT**

1. The appellant, Cosmas Kipyegon Koros, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The information against him stated that on 19<sup>th</sup> August 2016 at Lebekwet village in Kembu Location, Bomet County, he murdered Mercy Cherotich Tesot. He was tried before the High Court in Bomet and, in the judgment dated 31<sup>st</sup> May 2017, found guilty as charged. He was sentenced to death, the penalty prescribed under section 204 of the Penal Code.
2. Dissatisfied with his conviction and sentence, the appellant has filed the present appeal in which he raises three grounds of appeal in the memorandum of appeal dated 9<sup>th</sup> November 2023. He contends that the trial court erred in failing to find that the prosecution did not prove its case beyond reasonable doubt; in finding him guilty of murder; and in imposing the death sentence which was overly harsh in the circumstances. He prays that this court allows his appeal and sets aside the sentence; but in the event that the conviction is upheld, that the sentence is set aside and substituted with a conviction and, presumably, sentence for the offence of manslaughter contrary to section 205 of the Penal Code.
3. As this is a first appeal, we are under an obligation to re-evaluate the evidence presented before the trial court and reach our own conclusion. In doing so, we are required to bear in mind that, unlike the trial court, we did not have the benefit of hearing and observing the witnesses- see *Okeno vs. Republic* [1972] EA 32.



4. The prosecution case was presented through ten witnesses. Caren Cherono (PW1), a girl aged twelve, testified that on the material day, at about midday, she was at home with the deceased and other children. The deceased was inside the house, preparing vegetables, when the appellant arrived and said that he wanted his children. The deceased refused, and the appellant stabbed her in the back with a knife. Caren saw the deceased run out of the house then fall down unconscious. She testified that after stabbing the deceased, the appellant ran away while still holding the knife in his hands.
5. In cross-examination, Caren stated that the appellant asked for his children and when the deceased refused to give them to him and moved into the house while holding a child, he followed her inside the house and slapped the child, causing her to fall down; that the appellant then stabbed the deceased and run out of the house; and that the appellant and the deceased had not quarreled before he stabbed the deceased.
6. Cosmas Kipkoech Kirui, a neighbour, heard screams from the home of the deceased at about 1.00 p.m. He ran to the scene and met members of the public who had arrested the appellant. He testified that they briefly released the appellant as he said that he had gone to collect his children and his wife had screamed for help, but they were informed that he was armed with a knife and had stabbed his wife. They went searching for him but only recovered his shoes, which PW2 identified in court, 200 metres from where they had arrested him. PW2 confirmed in cross-examination that the appellant was wearing the white sports shoes when he was arrested by members of the public.
7. Joseph Arap Kiprono Tesot (PW3), the deceased's father, received information at 7.00 p.m. on the material day that the deceased had been stabbed by her former husband, the appellant. He testified that they took the deceased, who had been stabbed in the back, to the Longisa Hospital where she was admitted, but she passed away the following day. He identified the body for the doctor who performed the post mortem. It was his testimony that the appellant and the deceased had been married for six years but had separated six months before; that the appellant had previously gone to PW3's home, armed with clubs, to demand custody of the children, and had fought with PW3; and that he had not paid dowry for the deceased.
8. Like PW2, Jackson Cheruiyot Likwop (PW4) heard screams from PW3's house about midday on the material day. He went to the scene and found PW1 and the other children screaming. They informed him that the deceased had been stabbed by her husband. She was lying on the ground outside the house. He and others took her to the roadside and she was taken to the hospital.
9. Winnie Chepkirui Yegon (PW5) also responded when she heard screams from PW3's house at about midday on the material day. She went to the scene and saw somebody running towards the river. At PW3's home, she found the deceased lying on the ground at the door of PW3's house with stab wounds on the back.
10. Monicah Chelangat Mibei (PW6), also rushed to the scene when she heard screams from PW3's house. She found PW1 and other children at the scene, crying. The deceased was lying on the ground. PW6 and others took the deceased to hospital where they left her, and she learnt the following day that the deceased had passed away. Like PW2, PW4, PW5, and PW6, Esterline Chepkoech Tesot (PW7) was at the farm when she heard screams coming from her home. She ran there and upon arrival, found the deceased lying unconscious outside the house, with blood oozing from her back. She was informed by PW1 that the deceased had been stabbed by her husband, who had then run away.
11. Dr. Langat Robert PW8), based at Longisa Hospital, performed the post mortem on the deceased on 23<sup>rd</sup> August 2016. His testimony was that the deceased, 20 years old, had a 3- centimetre-long stab



- wound on the back of the scapula, penetrating to the thorax. She also had massive haemothorax and a puncture wound on the left lung. He testified that the cause of her death was cardio-pulmonary arrest secondary to chest injuries.
12. IP Naomi Nyapara (PW9), attached to Bomet Police Station, was called to the report office at the station on 22<sup>nd</sup> August 2016 at around 1.30 p.m. She found one Winnie Chepkemoi, her brother Mathew Kibet and the appellant, Cosmas; that the appellant stated that he had surrendered himself to police custody; that his wife, whom it was alleged he had murdered, had called him to go and collect children but had raised an alarm; and that he was not aware what happened but he was armed with a knife and club. PW9 arrested him and preferred the charges against him.
  13. Hamisi Jillo (PW10) attached at Longisa Police patrol base under Bomet police station received a report on the murder in the morning on 20<sup>th</sup> August 2016 from PW3, the father of the deceased. He also received a knife from members of the public which he was informed had been dropped by the appellant at the Kipseon river. He also retrieved the deceased's blouse, which was blood stained and had a cut mark, from the verandah. He produced the knife, blouse and white shoes, also recovered from the river, in evidence.
  14. When placed on his defence, the appellant gave an unsworn statement in which he stated that the deceased was his wife; he had married her in 2009, and they had stayed together till 2016. Regarding the material day, he stated that he went to the home of the deceased's parents where she was staying with their children at the invitation of the deceased; that he found her with children and there were people taking alcoholic drinks with whom he quarreled; that one of the attackers had a knife, and the deceased was stabbed when she tried to shield him. He also suggested that there was a grudge between him and the deceased's father because his father-in-law had taken away his cow, which he had borrowed for milking, and the owner of the cow had subsequently taken it away from his father-in-law.
  15. In his submissions dated 9<sup>th</sup> November, 2023, the appellant, represented at the hearing by learned counsel, Mr. Sanjay Bhansali, contends that the prosecution's key witness, PW1, who claimed to have been present at the crime scene, was unable to identify the knife allegedly used in the murder; and that any attempt to link the murder weapon to him fails to meet the necessary legal standards and is insufficient. He contends further that the prosecution had not demonstrated the presence of mens rea, and there is no indication of premeditation or planning for the murder.
  16. With regard to sentence, the appellant submits that in light of the contested conviction, 'the subsequent sentencing is premature and unjust'. The imposition of the death penalty in this case, he submits, is excessively severe and disproportionate. It is his submission that he was sentenced to death because a death sentence was mandatory, which undermines the court's authority to consider mitigating factors. He relies for this submission on the Supreme Court decision in *Murnatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015)* [2021] KESC 31 (KLR) (6 July 2021) (Directions).
  17. In submissions dated 14<sup>th</sup> March, 2024, the respondent, through learned counsel, Mr. Omutelema, Assistant Director of Public Prosecutions, submits that PW1, the only witness who gave direct evidence of the offence, was a credible witness to the murder. The trial court, which had the benefit of seeing her, had considered that she was not a child of tender years; that she gave a clear picture of what transpired, and that her evidence, given on oath, withstood strenuous cross-examination.
  18. The respondent submits further that the evidence of PW1 was corroborated by PW2 and PW3. Further, that the appellant's own statement in his defence corroborated PW1's evidence in material particulars, confirming that he was present at the scene, though he denied stabbing the deceased.



19. The respondent further submits that the medical evidence was satisfactory and consistent with the evidence of the eye witness. Its submission is that malice aforethought can be inferred from the appellant's act of stabbing the deceased using a knife; that the fatal attack was premeditated as the appellant went to attack the deceased while armed with a knife; and that prior to that, he had gone and threatened to kill the deceased's father while armed with a knife and clubs. With regard to the appellant's defence that the deceased was stabbed by some people who were fighting with him, the respondent submits that the trial court considered this defence against other evidence and, rightly, rejected it.
20. Regarding sentence, the respondent submits that there were aggravating circumstances, which it enumerated, justifying the imposition of a stiff sentence.
21. We have considered the appellant's grounds of appeal against the prosecution evidence, the appellant's defence and the judgment of the trial court. We have also considered the submissions of the parties. In our view, two issues arise for our determination. First, whether the prosecution established its case against the appellant to the required standard, beyond reasonable doubt. Should the answer to this issue be in the affirmative, we shall consider the second issue: whether we should interfere with the sentence meted out on the appellant.
22. The appellant faced a charge of murder, the victim his wife of six years. To establish its case against the appellant, the prosecution was required to establish, beyond reasonable doubt, the death of the deceased, the cause of the death of the deceased, that the appellant was responsible for the death of the deceased, and that he caused the death with malice aforethought.
23. The evidence of PW1, Caren, was that the appellant went to their home at about midday on the material day, 19<sup>th</sup> August, 2016, and found her, the deceased and his children. The deceased was inside the house, preparing lunch. The appellant demanded to be given his children, and the deceased refused. The appellant followed her into the house and slapped one of the couple's children, whom the deceased was holding, and the child fell down. The deceased then stabbed the deceased in the back. She rushed out and fell down, while the appellant ran away, still holding the knife.
24. The father of the deceased, PW3, learnt of the attack on his daughter about 7.00 p.m. on the material day. His testimony was that the appellant and his daughter were estranged though they did not, in his view, have a proper marriage as they had eloped and the appellant had not paid dowry. A few days prior to the murder, the appellant had gone to PW3's home, armed, demanding to be given his children, and threatening to kill the deceased's father. PW3 and the appellant had fought, and the appellant had left, only to return later, in the absence of PW3, and fatally attack the deceased.
25. PW4, 5, 6 and 7 were all attracted to the scene by screams from the children. They went to the scene and found the deceased lying on the ground, with a stab wound to the back. They were informed by PW1 that the deceased had been attacked by her husband, the appellant, who was demanding custody of his children.
26. Upon hearing screams, PW2 had rushed towards the source and found that the appellant had been arrested by members of the public; that the appellant explained that he had gone to collect his children and his wife screamed, and he was released; that upon learning that the appellant was armed with a knife, the crowd went to look for him, but they only found the white shoes that he had been wearing.
27. The evidence of the doctor who performed the post mortem on the deceased was that she had a massive haemothorax and a puncture wound on the left lung, and the cause of her death was cardio-pulmonary arrest secondary to chest injuries.



28. Having considered the above evidence, we are satisfied that the trial court correctly found that the appellant, with malice aforethought, caused the death of the deceased. The evidence shows that the appellant and the deceased were, in a manner of speaking, husband and wife. They were estranged. Prior to the fatal attack on the deceased, the appellant, armed with clubs, had aggressively demanded custody of their children, but was thwarted by PW3, the father of the deceased, with whom he fought and threatened to kill. He returned on the material day, at midday, when only the deceased, with young children, the oldest of whom was 12 years old, were at home. When the deceased resisted his demand to have custody of their children, he slapped one of them from her arms, then stabbed the deceased in the back.
29. In his defence, the appellant alleged that the deceased was stabbed by some people who were fighting him when she intervened and tried to save him from them. A likely tale indeed! As the trial court observed:
- “The accused, who does not deny to have been at the scene was nowhere to be found. He had escaped. If the deceased had shielded him from the attack then he should have been the first to reciprocate by taking her to hospital but not to leave her lying on the ground. His action of botting (sic) and leaving the scene is not consistent with innocence.”
30. We agree fully with this finding by the trial court, and with its conclusion that he caused the death of the deceased with malice aforethought, an essential ingredient in the offence of murder, when it stated:
- “In the instant case, the accused and the appellant were not in good terms. That was among the reasons why she had gone back to stay with her parents.
- The Accused had been advised to pay dowry but he was not willing or was not able to abide with the conditions given to him. It is apparent from the evidence on record that when his efforts to take custody of the children were thwarted, he proceeded to arm himself with a knife and fatally stabbed the deceased.
- ...
- The stabbing of the deceased on the back was a deliberate act on the part of the Accused who had differed with her on the issue of custody of the children of their marriage. The thrust and depth of the injuries which punctured the lungs was a clear indication on the part of the accused to inflict and cause grievous harm on the deceased or to kill. ... malice aforethought was clearly established in this case. I am satisfied that the prosecution proved their case beyond reasonable doubt.”
31. The appellant asks this Court to find that the sentence meted out against him is harsh and takes away the discretion of the court. The Supreme Court addressed the issue of sentencing upon a conviction for murder in its decision in Francis Karioko Muruatetu & another v Republic [2017] eKLR in which it set out the factors to be considered in sentencing as including the age of the offender; whether the accused is a first offender; whether the offender pleaded guilty; the character and record of the offender; commission of the offence in response to gender-based violence; remorsefulness of the offender; the possibility of reform and social re-adaptation of the offender; and any other factor that the Court considers relevant.
32. Even though this case was heard and sentence passed prior to the Muruatetu decision (judgment in which was rendered on 14<sup>th</sup> December 2017), and the trial court noted that the penalty prescribed for the offence of murder was death, it nonetheless gave the appellant an opportunity to make a statement



in mitigation, which he did through his counsel on record. He stated that he was thirty years old, a peasant farmer and the sole breadwinner for his two children; that he was remorseful as a precious life had been lost; that he had been in custody since 6<sup>th</sup> September, 2016, during which time he had learned lessons of life and had made peace with his maker; and should he be executed, his children would be orphaned.

33. The respondent argues that there are special circumstances that justify the death penalty against the appellant. It enumerates these special circumstances as being: the use of a lethal weapon; that the deceased was stabbed in the back; the case had strong elements of domestic violence; the appellant had earlier threatened to kill the deceased's father; and the deceased was taking care of their young children.
34. We have considered the facts and circumstances of this matter, as well as the mitigation offered on behalf of the appellant. We take the view that, in line with the reasoning in *Muruatetu* while the appellant may not merit the death sentence meted out by the trial court, he deserves a severe custodial sentence.
35. The appellant murdered his wife, the mother of his children. He went to her father's home, where she had sought refuge, probably from a violent domestic situation, while armed with a knife. She was a young girl, just twenty years old, married to the appellant, ten years her senior, for six years, so probably only fourteen years old when he took her from school and made her his 'wife', an offence under the *Sexual Offences Act*. He stabbed her in the back- the very manifestation of cravenly conduct is one who stabs another in the back- in broad daylight, in the presence of children, two of whom were his children, doubtless under six years of age, and the oldest of whom, PW1, twelve years old, all subjected by his brutal act to unimaginable psychological trauma. And he has the effrontery to say in mitigation that he is the sole bread winner for the children, and they will be orphaned if he is hanged!
36. The appellant's appeal on conviction is hereby dismissed. With regard to sentence, we hereby set aside the sentence of death and substitute therefor a sentence of thirty (30) years' imprisonment, to run from the date of sentence by the trial court.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024.**

**MUMBI NGUGI**

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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**

