



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mutai v Republic (Criminal Appeal 60 of 2018)  
[2024] KECA 1527 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1527 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 60 OF 2018  
MA WARSAME, S OLE KANTAI & WK KORIR, JJA  
OCTOBER 25, 2024**

**BETWEEN**

**WESLEY KPYEGON MUTAI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the Judgment of the High Court of Kenya at Kericho  
(Mumbi Ngugi, J.) dated 27th June, 2018 in H.C.CR. Case No. 32 of 2013)*

**JUDGMENT**

1. The appellant, Wesley Kipyegon Mutai, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged in the Information that he murdered Alphonse Nejeeye Fundi. on 28<sup>th</sup> July, 2013 at Kimugul Village, Londiani in Kericho County. He denied the charge. After a trial where the prosecution called 9 witnesses and he gave unsworn testimony in his defence he was convicted in a judgment delivered by Mumbi Ngugi, J. (as he then was) on 27<sup>th</sup> June, 2018 and sentenced to serve 25 years in prison. He is dissatisfied with the sentence imposed and in “Grounds of Appeal on Sentence” the appellant complains that the sentence is excessive, harsh and unjust considering that he was a first offender, an old man who needed a lesser sentence; that he is remorseful and repentant; that he worked hard to support his family before he was sentenced; that the court should consider the provisions of section 333 Criminal Procedure Code and factor them in the sentence.
2. The facts of the case as presented by the prosecution were that on 28<sup>th</sup> July, 2013 Anna Chemutai Cheris, mother of the appellant and widow of the deceased was at home at 6 p.m. when she heard screams in the compound. She went out to investigate and heard the deceased screaming that the appellant was killing him. She saw the appellant leaving the scene armed with a panga. On reaching the scene she found the deceased lying on the ground dying; he had a wound in the chest and was bleeding badly. She identified the panga in court as the weapon that the appellant used to kill the deceased. She



further testified that the deceased was not the father of the appellant, she had gotten married to the deceased when she already had him.

3. That evidence was corroborated by various witnesses who visited the scene.
4. Dr. Fibian Kosgei of Kericho District Hospital testified on behalf of a colleague who had conducted postmortem on the body of the deceased. The doctor found a penetrating injury in the chest, entry side was about 6 cm x 2 cm on anterior chest; there was dried blood from both the mouth and nose; there was haemothorax (accumulation of blood in chest cavity) with laceration of the right lung and the trachea had also been cut. In the cardiovascular system both the aorta, pulmonary artery and veins had been cut.
5. The doctor opined that cause of death was a penetrating injury into the chest which cut the aorta and pulmonary artery resulting in haemothorax.
6. Upon conviction the prosecution informed the trial court that the appellant "... may be treated as a first offender. We do not have his record." In mitigation the appellant stated that he was a first offender, a father of 4 children who depended on him; he was a first born in a family of 8; he was remorseful and he was 50 years old. He asked for a lenient sentence.
7. The trial Judge considered mitigation and a report by a Probation Officer which report painted a troubled family where the appellant, his deceased step-father and his siblings were fighting over family assets which the deceased was alleged to have been squandering. The court considered that the appellant did not kill the deceased in a fit of anger or in the heat of passion but that he had cold bloodedly planned that execution. He had:

... waited for him on a rainy night, in a cow shed, and stabbed him to death ..."

8. The court considered that the appellant, then aged 50 years, should not have been fighting his step-father over family property but should have gone out to get his own property. The court considered the Supreme Court of Kenya decision in *Francis Karioko Muruatetu & Others vs. Republic* [2017] eKLR and awarded a custodial sentence for murder, not the death sentence.
9. The appellant tells us that the sentence of 25 years imprisonment is harsh and excessive; that he is repentant and remorseful.
10. The trial Judge considered the seriousness of the offence where the appellant planned and executed the murder of his step-father. There was no evidence of any form of provocation. The court considered that the offence of murder called for a death sentence under section 204 of the Penal Code but awarded a sentence of 25 years instead. We think that the appellant was lucky in those circumstances to be sentenced to those years when he had committed a heinous crime. The appeal on sentence has no merit. It is dismissed.

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

**M. WARSAME**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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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**

