



**Wanyama v Republic (Criminal Appeal 80 of 2019)  
[2024] KECA 1456 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1456 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 80 OF 2019  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
OCTOBER 18, 2024**

**BETWEEN**

**SYLVIA OJIAMBO WANYAMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Busia (K. W. Kiarie, J) delivered on 19th February, 2019 in HCCRA No. 24 of 2016)*

**JUDGMENT**

1. The appellant, Sylvia Ojiambo Wanyama, was arraigned before the High Court for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It was alleged that on the 26<sup>th</sup> September, 2016 at Nasikina village in Bukhayo West location in Busia County, she murdered Maureen Karani (hereinafter referred to as deceased).
2. The appellant pleaded not guilty to the charge. After a full trial, in which the prosecution called a total of 7 witnesses, while the appellant opted to remain silent in her defence, she was convicted and sentenced to death.
3. The circumstances leading to the appellant's conviction as per the evidence that was adduced before the High Court, was as follows: at the material time the appellant's husband owned a salon and had employed Michael Barasa (Michael) in the salon. On the material day, the appellant went to the salon and found Michael attending to a customer. She inquired from Michael whether he knew the customer he was serving, and Michael responded that it was not for him to know all the customers who come to the salon. The appellant then asked the customer if she knew her, and the customer responded that she did not know her. The appellant demanded to know why the customer had on the previous day tried to hide when she saw her. There was some exchange of words, but Michael prevailed on the appellant to let him finish the work on the customer. The appellant then went out of the salon. According to



Praxides Nasimiyu Busera (Praxides), who operates a shop next to the salon, the appellant went to the shop and borrowed a knife from her, claiming she needed it to cut some vegetables. The appellant went away with the knife, and shortly thereafter, Michael was surprised when the appellant suddenly stabbed the customer on the neck, then ran away. Michael rushed the customer to the district hospital but unfortunately the customer died before she was attended to.

4. Francis Sebea Odena (Francis) was in his house when he heard a commotion outside. On coming out of the house, he learnt of what had transpired, he called Stephen Ouma Osige, the Assistant Chief of Isikulu Sub-location, and they started looking for the appellant. They found her hiding under a bed in the house of one Grace. The Assistant Chief apprehended her, and as they were moving towards the scene, they recovered a knife in a cassava plantation about 6 meters from where there was a blood-stained towel. They took the appellant and the knife to Isikulu AP camp.
5. Edwin Odinga (Edwin), husband to the deceased learnt of the death of his wife. He later identified the body of his deceased's wife who was the customer stabbed with a knife, to Dr. Sande Kahindi Charo (Dr. Charo), who performed a postmortem examination. Dr. Charo, produced a medical report in which he observed that the deceased had a 2cm penetrating wound on the left side of the neck, that the trachea was severed as well as the left artery and external jugular. Dr. Charo formed the opinion that the cause of death was hypovolemic shock secondary to excessive bleeding, as a result of the penetrating injury at the neck.
6. At the close of the prosecution case the Court ruled that the appellant had a case to answer, but when she was put on her defence, she exercised her right to remain silent.
7. In a short Judgement, the learned Judge found that the deceased was fatally stabbed while in the salon, that the appellant as per the evidence of Praxides borrowed a knife from Praxides, and this is the knife that she used to fatally stabbed the deceased. The Judge found that this evidence coupled with the appellant's action of attempting to hide after the incident confirmed that she was the one who stabbed the deceased.
8. In addition, that the appellant had malice aforethought as she borrowed the knife, on the pretext of cutting vegetables with it, only to use it to viciously attack the deceased. The learned Judge, therefore, found the prosecution case proved beyond reasonable doubt, convicted the appellant and sentenced her to death, stating that it was the only sentence prescribed under the law.
9. Being aggrieved by his conviction and sentence, the appellant lodged the instant appeal in which, as per the memorandum of appeal filed by her advocate, Onsongo & Co. Advocates, he faulted the Judgement of the High Court on seven (7) grounds. In brief the grounds are that the learned Judge erred: in failing to appreciate that the prosecution did not establish the elements of the offence of murder; in failing to strictly apply and give directions in compliance with Section 200 (3) of the Criminal Procedure Code, thereby breaching the appellant's right to fair trial; in delivering a judgement not complying with Section 169 of the Criminal Procedure Code; in using evidence obtained in breach of the appellant's constitutional rights; in taking into account the postmortem examination report, when the same was anchored on blood samples that were not proved to be from the deceased; in imposing a harsh and manifestly excessive sentence contrary to Article 50(2)(p) of *the constitution*; and in misapprehending and misconstruing the provision of Section 204 of the penal code, and Article 25 and 29 of *the constitution* regarding sentencing.
10. Mr. Richard Onsongo, learned counsel for the appellant, filed written submissions in support of the appeal. Counsel faulted the judgement of the High Court, contending that the learned Judge did not set out the evidence of the witnesses for the prosecution, and instead delved into the analysis of the evidence and determination of the case without adhering to the requirement of Section 169 of the



Criminal Procedure Code. Counsel cited *Pandya vs Republic* [1957] EA 336; & *Kiilu & another vs Republic* [2005] 1KLR 174; on the obligation of this Court, as a first appellate court, to submit the evidence as a whole to a fresh and exhaustive examination.

11. On the burden of proof, counsel for the appellant, submitted that except where a case is one of strict liability, the burden of proof in criminal trials always rests with the prosecution, and the standard of proof is beyond reasonable doubt. On the defence of insanity, counsel argued that the same was unique as it could be raised by the prosecution and the Judge, in addition to the defence; that it is generally the defence seeking to avoid a finding of insanity, and often the defence will change a plea to guilty to avoid a finding of insanity. Counsel submitted that the defence of insanity is a complete defence; and it is only an accused person who can raise it; and that it is not open to the prosecution to raise it. Counsel relied on the old *M’Naghten’s case* [1843] 10 (C) and (F) 200.
12. Counsel for the appellant argued that the defence of insanity is a statutory defence which is an exception to the provisions of Section 11 of the Penal Code. He identified the defence of insanity as having three aspects. That is, insanity at the time of the offence, which is determined by the application of the *M’Naghten’s* rules, under which it must be established that at the time of the offence, the offender was suffering from a defect of reason; the defect of reason must be caused by a disease of the mind and the defect of reason must be such that the offender did not know what he was doing or if he did know, he did not know that it was wrong.
13. Counsel submitted that for the appellant to be forced to have a mental assessment through a court driven process, of being examined by a psychiatrist, the prosecution, and by extension the State, took away from the appellant a complete defence as she was never accorded a chance of agreeing or disagreeing to be examined by a psychiatrist, but was involuntarily taken through a process that denied her a chance to raise the defence of insanity, which was in breach of her constitutional rights as provided under Article 49 of *the Constitution*. Thus, counsel argued, the entire trial was a nullity. He urged the Court to set aside the judgement and the proceedings and order for a retrial.
14. In regard to Section 200 (3) of Criminal Procedure Code, counsel for the appellant submitted that this was not complied with; that instead of proceeding with the trial, the hearing should have started afresh, since only one witness had already testified. He relied on *Ndegwa -vs- Republic* [1985] KLR 535 and *Abdi Adan Mohammed -vs- Republic* [2017] eKLR, maintaining that the appellant’s right to a fair trial was violated, as Section 200 (3) of the Criminal Procedure Code was not explained to her, and she was prejudiced, her right to participate in the trial process during her trial, having been sacrificed at the altar of convenience.
15. In addition, the appellant’s advocate submitted that the evidence regarding the knife, was obtained in breach of the appellant’s constitutional right, and without regard to the fact that Section 31 of the *Evidence Act* was repealed by Section 102 of the Criminal Law Amendment Act (Amendment) *Act No. 5 of 2003*, and that the recovery of the knife by the Assistant Chief shows that it was done in breach of the provisions of Article 50(4) of *the Constitution*, and that the evidence was obtained and tendered in evidence without support of the law. Counsel added that the blood stains on the knife were not proved to be from the deceased, and therefore the knife was not linked to the death of the deceased.
16. With regard to malice aforethought, counsel submitted that the prosecution did not establish a case of murder, but that of manslaughter. This was because the deceased and the appellant exchanged words touching on an incident that allegedly occurred on the previous day. It was submitted that the prosecution did not establish malice aforethought, and that the tenor and purport of the evidence pointed to an allegation that the deceased was intimately involved with the appellant’s husband, who



was the owner of the salon, and therefore Section 208 of the Penal Code ought to have been invoked to reduce the offence to one of manslaughter.

17. Finally, on sentence, the appellant relied on *Godfrey Ngotho Mutiso -vs- Republic* [2010] eKLR, maintaining that a mandatory death penalty removes the sentencing power of the court by fixing a mandatory death penalty, which is inconsistent with Article 126 of *the Constitution*. Counsel also cited *Alister Anthony Pereira -vs- State of Maharashtra*, Criminal Appeal No. 1318 – 1320 of 2007, and *Opoya -vs- Uganda* [1967] EA 752, contending that, whether a sentence meets the ends of justice depends on the facts and circumstances of each case, and that the word “shall be liable” does not ordinarily require the imposition of the stated penalty, but merely express the penalty which may be imposed, at the discretion of the court. Counsel therefore argued that the trial court misdirected itself on the discretion of the court in sentencing. He urged the Court to allow the appeal and set aside the sentence that was imposed on the appellant.
18. The respondent filed written submissions through Ms. Busienei, a Senior Principal Prosecution Counsel in the Office of the Director of Public Prosecutions (ODPP). Counsel noted that in his memorandum of appeal dated 1<sup>st</sup> September, 2023, the appellant raised three grounds of appeal. These were, that the learned Judge erred in law and fact: in failing to find that the case was not proved to the required standard of beyond reasonable doubt; that Section 200 of the Criminal Procedure Code was not complied with and that the sentence was harsh and excessive.
19. Counsel submitted that in order to establish its case to the required standard, the prosecution had to prove that the appellant was the person who killed the deceased, and that the killing was with malice aforethought. Ms. Busienei argued that the death of the deceased was testified to by the prosecution witnesses including Consolata Awino, a sister to the deceased, and Edwin, husband to the deceased who identified the body to Dr. Charo who performed the postmortem examination. The cause of death was established to be hypovolemic shock secondary to excessive bleeding as a result of a penetrative injury on the neck.
20. Counsel submitted that there was direct evidence given by Michael that the appellant stabbed the deceased on the neck using a knife and this was consistent with the evidence of Praxides who stated that the appellant had just borrowed a knife from her. In addition, the appellant was found hiding under a bed when she was arrested by Francis and the Assistant Chief. Counsel submitted that malice aforethought was proved under Section 206 of the Penal Code, through the manner in which the injuries were inflicted on the deceased, and that the appellant had the intention to cause death or to do grievous harm to the deceased. Counsel relied on *Ali Salim Bahati & Another -vs- Republic* [2019] eKLR, for the proposition that the vicious attack on the deceased was a clear indication that death was intended.
21. On the issue of defence of insanity, Ms. Busienei argued that this was never raised before or during the trial; that the appellant opted to keep quiet in her defence; and that she did not attempt to prove any defence of insanity and the same cannot be raised at this stage. On Section 200 (3) CPC, counsel maintained that the same was complied with as reflected from the court proceedings.
22. Finally, on sentence, counsel conceded that the mandatory death sentence was unconstitutional, in light of the Supreme Court decision in *Francis Karioko Muruatetu & Another -vs- Republic; Katiba Institute & 5 Others (Amicus curie)* [2021] eKLR, (*Muruatetu 2*). She therefore conceded to the setting aside of the mandatory death sentence and urged the Court to set aside the death sentence and impose a term sentence.



23. This being a first appeal, this Court is obligated to exhaustively re-evaluate and analyze the facts and evidence, that was before the trial court, in order to arrive at its own decision. In *Okeno v R*, [1972] E.A. 32 the Court stated this obligation 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 v R* [1957] EA 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 conclusion (*Shantital M Ruwala v R*, [1957] EA 57). 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 courts’ findings and conclusions; it must make its own findings and draw its own conclusion 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 witness.”

24. Having carefully considered the record of appeal, the contending submissions of the respective counsel, the authorities cited, and the law, we find several issues that emerge for our determination. First, is whether the issues raised by the appellant in regard to the procedural correctness of her trial, are open to this Court for consideration, if so whether the appellant’s right to fair trial was breached. Secondly, whether the charge against the appellant was proved to the required standard and the evidence adduced sufficient to sustain his conviction, and thirdly, whether the sentence that was imposed on the appellant is unconstitutional or excessive as to justify our intervention.
25. The appellant raised two issues that, in her view, were a breach of his right to a fair trial. She complained that by being subjected to a psychiatric examination at the instance of the court, her right to a fair trial was curtailed, as her right to raise the defence of insanity was compromised. The respondent objected to this issue, contending that the issue of defence of insanity at the time of the commission of the offence, was not raised by the appellant during the trial, and that the defence of insanity is a matter of fact, that ought to have been proved by the appellant but she did not adduce any evidence in this regard.
26. Section 11 of the Penal Code provides that every person is presumed to be of sound mind and to have been of sound mind at any time which comes in question, until the contrary is proved. This provision shifts the burden of proving the defence of insanity to an accused person, who alleges to have been insane at the time of the commission of the offence.
27. Section 12 of the Penal Code provides for the application of the defence of insanity in the following terms:
12. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is, through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease if such disease does not, in fact, produce upon his mind one or other of the effects above mentioned in reference to that act or omission.
28. The medical examination that an accused in a murder trial is subjected to, before the hearing commences, is intended to confirm that the accused person is fit to stand trial. The examination is not to establish that the accused person was fit at the time the offence is alleged to have been committed. That remains a matter of fact subject to the presumption in Section 11 of the Penal Code, and it is open to an accused person to dislodge the presumption through adduction of appropriate evidence. Therefore, the fact that the appellant was subjected to a psychiatric examination at the instance of the



court before the trial took off, did not in any way prejudice the appellant or compromise her right to raise the defence of insanity.

29. The respondent contended that the defence of insanity was not raised by the appellant before the trial court and that the appellant has raised the same for the first time in this appeal. We have painstakingly re-examined the record of appeal, and find that the respondent's contention is supported by the record of the trial court, as the issue of insanity is not adverted to anywhere by the appellant or his advocate, either before or during the trial. Moreover, insanity can only be a defence if it is raised by an accused who proves that at the time of the commission of the offence, the accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act that he was charged with, or was incapable of knowing that it was wrong or contrary to law, and this test is strictly on the time when the offence was committed and no other time. (See Leonard Mwangemi Munyasia vs R [2015] eKLR).
30. The respondent has not demonstrated any prejudice that was occasioned to her, as she did not raise the defence of insanity, nor lead any evidence to demonstrate that at the time the murder occurred she was suffering from insanity. Nor did she depict a behavior during the trial that could suggest insanity. Further, she did not object to the mental assessment ordered by the court, nor did she make any attempt to seek a second medical opinion on her mental status. Of importance is that the appellant, who was, at all times during the trial represented by counsel, did not raise any issue in the trial court regarding the violation or compromise of his right to raise the defence of insanity. The matter has been raised for the first time in this Court. The trial court did not, therefore, have an opportunity to render itself on the issue, and cannot thus be faulted for erring on an issue that was not before it.
31. Turning to Section 200 (3) of the Criminal Procedure Code, the appellant complains that her rights under Article 50[1] of *the Constitution* were curtailed, as her views on how the case was to proceed under Section 200 (3) of the Criminal Procedure Code, were not obtained. The record of the trial court shows that counsel for the appellant who was then on record, stated to the court that they would proceed from where the previous Judge had stopped, which meant that they were not recalling any witness who had already testified. Section 200(3) of the CPC provides thus:

Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

32. In *Ndegwa v Republic* (1985) eKLR this Court stated that:

“Section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where exigencies of circumstances, not only are likely but will defeat the end of justice, if a succeeding Magistrate does not, or is not allowed to adopt and continue a criminal trial started by a predecessor or owing to the latter becoming unavailable to complete the trial.”

33. Similarly, in *Joseph Kamau Gichuki v Republic* (2013) the Court of Appeal stated that:

“This Court has previously held that section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. Some of the considerations to be borne in mind before invoking section 200 include whether it is convenient to commence the trial de novo, how far the trial had proceeded, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that



had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused”

34. In *Johanes Amadi v Republic* (2018) eKLR the Court of Appeal stated that:

“.. Before a Judge proceeds with a trial in which another Judge has partly heard and recorded evidence, the accused person must be informed of his right to have the hearing proceed *denovo* or proceed from where the previous Judge had reached. Should the accused person choose to proceed with the trial from where it has reached, the court must inform him of his right to have any of the witness who have already testified re- summoned and re-heard.”

35. Section 200(3) of the Criminal Procedure Code places an obligation on the succeeding magistrate, where the matter is proceeding from where the former magistrate left, to inform the accused person of his right to recall any witnesses who have already testified. This section applied *mutatis mutandis* to a trial by a Judge.

The record shows that the appellant was represented by counsel. The appellant’s counsel informed the trial court that the matter should proceed from where it had reached. The record shows that only one witness had testified. Therefore, the trial Judge was right in assuming that the advocate was acting on the appellant’s instructions. In our view, the appellant was not prejudiced by the failure of the trial Judge to inform him of this right to recall the witness who had testified. In any case, most of the witnesses testified before the succeeding Judge.

36. Coming back to the substantive issues, the appellant was tried and convicted of the offence of murder under Section 203 as read with Section 204. Section 203 of the Penal Code provides as follows:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

37. To establish the charge of murder against the appellant, the prosecution had to prove beyond reasonable doubt, that the death of the deceased occurred; that the death was caused by an act or omission on the part of the appellant, and that in committing the act or omission, the appellant had malice aforethought. (See *Anthony Ndegwa Ngari v Republic* [2014] eKLR).

38. There is no dispute that the deceased died. Michael testified that he saw the appellant stab the deceased while the deceased’s husband, Edwin identified the deceased’s body to Dr. Charo for a post-mortem to be done. The post-mortem report prepared by Dr. Charo, showed that the deceased died due to hypovolemic shock secondary to excess bleeding. The question as to how the deceased sustained the fatal injury was answered through the evidence of Michael who placed the appellant whom he knew well, at the scene of the crime. Michael witnessed the altercation between the appellant and the deceased, before the appellant went out, only to come back and inflict the fatal wound on the deceased. Praxides’ evidence that she lent the appellant a knife at her request was consistent with the evidence of Michael and that of Dr. Charo who noted in the postmortem report that the appellant had a stab wound. In addition, the evidence of Francis and the Assistant Chief also implicated the appellant, as she was found hiding under a bed and upon being apprehended, assisted the two witnesses in the recovery of the knife. The evidence regarding how the knife was recovered did not quite come out and it is true as contended by the appellant that no evidence was adduced to show that the blood stains on the knife had any relationship with the deceased. Be that as it may, even without the evidence of the recovery of the knife, there was sufficient evidence that the deceased died as a result of being stabbed with a knife by the appellant, and that shortly before the stabbing the appellant had obtained a knife from Praxides.



This led to the inescapable conclusion that the appellant stabbed the deceased with a knife and the fact that there was no DNA evidence linking the knife to the deceased was not fatal to the prosecution case.

39. As to whether malice aforethought was established, the predecessor of this Court in *Republic v Tubere s/o Ochen* [1945] 12 EACA 63 stated that in determining whether malice aforethought has been established the following elements should be considered:

“The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab/wound or multiple injury; the conduct of the accused before, during and after the incident.”

40. From the evidence of Michael, he saw the appellant stab the deceased on the left side of the neck and this evidence is consistent with the postmortem report which showed that the deceased died as a result of hypovolemic shock secondary to excessive bleeding.

41. As to whether the prosecution proved that the appellant had malice aforethought when she struck the fatal blow, Section 206 of the Criminal Procedure Code provides as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

- a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- 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;
- c. an intent to commit a felony;
- d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

42. Malice aforethought was succinctly discussed by this Court in *Nzuki v R* [1993] KLR 171 in the following terms:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

- i. The intention to cause death;
- ii. The intention to cause grievous bodily harm;
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits these acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.”

43. It is immaterial, in such circumstances, whether the accused desired those consequences to ensue or not, nor is it material that the act and the intention were aimed at a potential victim other than the one who succumbed. In the circumstances before us, the pertinent question that arises is whether the



appellant in striking the fatal blow intended to cause the death of the deceased or cause her grievous harm. In *Bonaya Tutut Ipu & Another v R*, [2015] eKLR this Court cited with approval the persuasive authority of the Ugandan Court of Appeal case of *Chesakit v UG, Criminal Appeal 95 of 2004*, in which the Court held:

“In determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”

The court also drew inspiration from a decision of the predecessor of this Court in *Rex v Tuper S/O Ocher* [1945] 12 EACA 63 wherein, it was ruled:

“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily, an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick...”

44. From the post-mortem report, it was evident that the deceased died as a result of a stab wound on the neck. The neck is such a critical part of the human anatomy. It goes beyond peradventure, that once the neck is subjected to a serious injury such as a stab wound, death is eminent. The manner in which the appellant executed her mission, was very deliberate and targeted. She aimed the knife at the neck, a vital and delicate organ, with all her might. The result was the respiratory system, the trachea, the left artery and external jugular all being severed. There is no doubt that the appellant purposed to kill the deceased or cause her grievous harm. Therefore, malice aforethought was proved. In the circumstances, all the ingredients of the offence of murder were established to the required standard, and the appellant’s conviction is safe.

45. The appellant faulted the learned Judge for failing to comply with Section 169 of the Criminal Procedure Code, contending that the Judge did not set out the evidence of the witnesses for the prosecution but instead delved into the analysis of the evidence, and determination of the case without adhering to the requirements of Section 169 of the Criminal Procedure Code. That section deals with contents of judgment and states as follows:

“(1) Every such judgment shall, except as otherwise expressly provided by this Court, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which and the section of the penal code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.”

46. We have considered the judgment of the trial court which is dated and signed. While it is true that the judgment is fairly short being only about four and a half pages, the judgment states the offence of which the appellant was charged, that is murder contrary to Section 203 as read with Section 204 of the Penal Code, and also states the particulars of the offence. Although the learned Judge has not set out in detail the evidence which was adduced by the prosecution, the learned Judge has highlighted the salient aspects of the evidence and identified the issues for determination. The learned Judge also



considered the evidence in light of the ingredients of the offence of murder, and came to the conclusion that the prosecution had proved its case beyond reasonable doubt. Consequently, the learned Judge convicted the appellant of the offence of murder as charged. In our view, although the judgment is short, it contains all the requirements of Section 169 of the Criminal Procedure Code as contained in Section 169(1) and (2) quoted above.

47. In regard to the appeal against sentence, the appellant complained that the sentence of death that was imposed upon her is harsh, excessive, and unconstitutional. Section 379 of the Criminal Procedure Code provides as follows:

“379.1. A person convicted on a trial held by the High Court and sentenced to death, or to imprisonment for a term exceeding twelve months, or to a fine exceeding two thousand shillings, may appeal to the Court of Appeal—

- a. against the conviction, on grounds of law or of fact, or mixed law and fact;
- b. with the leave of the Court of Appeal, against the sentence, unless the sentence is one fixed by law.”

48. The above section gives this Court jurisdiction to entertain an appeal against a death sentence imposed by the High Court exercising its original jurisdiction. The appellant’s ground of appeal in regard to sentence is that the trial court failed to exercise its discretion when sentencing the appellant. The record shows that during the sentencing the appellant’s advocate was absent, and the appellant stated that she had no mitigation, whereupon learned judge proceeded to sentence her as follows:

“Though the accused is a first offender the attack on the deceased was unprovoked. I sentence her to suffer death as prescribed by the law.”

49. The Supreme Court in *Muruatetu & Another -vs- Republic; Katiba Institute & 5 Others (Amicus Curiae) (Petition 15 & 16 of 2015)* (Consolidated) [2017] KESC 2 (KLR) declared the mandatory nature of the death sentence as provided under Section 204 of the Penal Code unconstitutional. For this reason, learned Prosecuting Counsel Ms. Busienei wisely conceded the appeal against sentence, and urged the Court to impose a term sentence. While we agree that the death sentence should be set aside, we are of the view that this matter should be sent back to the High Court for resentencing so that the appellant can have the opportunity to mitigate. Only then, will the High Court be in a position to exercise proper discretion and impose an appropriate sentence.

50. For the above reasons, we dismiss the appeal against conviction, but set aside the sentence of death that was imposed upon the appellant. We remit the matter back to the High Court for the matter to be placed before any Judge of the High Court for a resentencing hearing to be done.

Those shall be the orders of this Court.

**DATED AND DELIVERED AT KISUMU THIS 18<sup>TH</sup> DAY OF OCTOBER, 2024.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**H. A. OMONDI**

.....



**JUDGE OF APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

