Munyekenye v Republic (Criminal Appeal 227 of 2019)
[2024] KECA 1660 (KLR) (15 November 2024) (Judgment)

Neutral citation: [2024] KECA 1660 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 227 OF 2019

HM OKWENGU, JM MATIVO & JM NGUGI, JJA

NOVEMBER 15, 2024

BETWEEN

ARNOLD OUMA MUNYEKENYE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Busia (Kiarie Waweru Kiarie, J) delivered on 13th June, 2019 in HC Criminal Case No. 12 of 2014)

JUDGMENT

1. Arnold Ouma Munyekenye, the appellant herein, was charged before the High Court at Busia, with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. According to the information that was duly signed by the Director of Public Prosecutions (DPP), the appellant murdered Pascal Orukana (deceased) on 5th March, 2014 at Ekisumu village, Sikinga sub- location within Busia County.

2. The appellant pleaded not guilty to the charge, and the matter proceeded to full hearing with the prosecution calling a total of eight witnesses in support of their case. On his part, the appellant gave a sworn statement and did not call any witnesses. At the conclusion of the trial, the appellant was found guilty of murder, convicted and sentenced to death.

3. Briefly, the evidence that was adduced by the prosecution during the trial, was that on 5th March, 2014, the deceased and his wife Celestine Nabwire (Nabwire), were asleep in their house, when the appellant knocked their door waking them up at about 11pm. The appellant asked the deceased for his hoe which had been taken to the deceased for fixing a handle. The deceased asked the appellant why he was going for the hoe at such a late hour. The appellant then left, after which the deceased and his wife locked the door and went back to sleep. Shortly thereafter they were woken up again by a loud knock on the door and the appellant calling out to them to open. The deceased got up and opened the door. Nabwire

then heard the deceased screaming that the appellant, whom he referred to as Ouma, had stabbed him. Nabwire noticed that the deceased had been stabbed on the left side of his abdomen. She ran out of the house screaming. Several neighbours and relatives including Vincent Odongo Ouma (Vincent), Ekesa Okomoli (Ekesa), Leo Bindi Katana (Leo) and Bernard Chitia (Bernard), responded to the alarm.

4. The witnesses noted that the deceased had an injury on the left side of his abdomen, and his intestines were protruding out. The deceased, who was still able to talk, informed his son, Vincent, Nabwire and his mother, one Macella, (who did not testify), that he was stabbed by the appellant whom he referred to as Ouma. The deceased repeated the same statement to Ekesa and also to Bernard. The witnesses tied the deceased's stomach with a lesso, and escorted him to the hospital, where he was admitted. He remained in the hospital for several days, but unfortunately died on 8th April, 2014. APC Cyprian Kinog who was attached to Nambale Administration Police Camp, received a report of the incident, visited the scene, and arrested the appellant on 6th March, 2014. Sergeant Mathias Kahudi Kondi (Sgt. Mathias) took over the investigation of the case and took further statements.

5. On the 14th April, 2014, Dr. Rosaline Malangachi (Dr. Malangachi), performed a postmortem examination on the body of the deceased. Her report was produced by her colleague Dr. Dickson Muchana, a consultant pathologist. The postmortem report showed that the body of the deceased, had a stab wound on the left side of the abdomen, as well as two minor perforations to the small intestine on the right abdomen. The cause of death was indicated as severe infection arising from the abdominal injuries.

6. In his sworn defence the appellant explained that on the material day he passed through a chang'aa den, where he found the deceased. They took chang'aa up to about 11pm, after which they proceeded to the deceased's home, because he wanted to collect his hoe which had been taken to the deceased for repairs. While he was in the house of the deceased, an argument ensued between the deceased and his wife. The appellant intervened and told them to stop the argument and the deceased became annoyed. The appellant then took the hoe and started going away, but the deceased followed him and hit him with the hoe handle on his back and his mouth knocking out his upper tooth. The appellant retreated but the deceased pursued him. A struggle ensued and the appellant dropped the hoe. The deceased had a knife, and in the struggle, the appellant stumbled on a tree stamp. Both the appellant and the deceased fell down. They then stood up, and the appellant released the deceased, who took his hoe and attempted to follow the appellant, but the appellant went away. The next morning the appellant was surprised to be arrested.

7. In a short three paged judgment, the learned Judge of the High Court rejected the defence of the appellant and found the appellant guilty of the offence as charged. We reproduce the pertinent section of the judgment which is in the following terms:

> " 5. The issues for determination are:
>
> a. Which of the two versions of the incident is believable;
>
> b. Whether the prosecution proved that the accused inflicted the fatal injuries to the deceased; and
>
> c. Whether the offence of murder was established.
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> 6. Celestine Nabwire (PW1) is the widow of the deceased. She testified that about 11pm on 5th March, 2014, she was in bed with the deceased. There was a knock at their door and the accused said he wanted to speak with the deceased. When the deceased opened for him, the accused asked for his hoe. The deceased asked

him why he was going for it that late (sic) and in any case, he was not the one who had taken it there. The accused left and returned after about ten minutes. When the deceased opened for him he stabbed him.

7. On the other hand, the accused contended that he accompanied the deceased to his home after partaking chang'aa together. This was for the purpose of picking his hoe that had been taken there for the fixing of a handle. His wife served them with some food. The deceased complained to him that his wife had offended him by digging upVsome arrowroots where he had told her not to. When she denied, a quarrel erupted between the couple and he intervened. The deceased was not pleased by his intervention. He picked his hoe and left. The deceased then called him from behind and told him not to go with the hoe. The deceased hit him on the back with the hoe handle and on the mouth where he knocked out one tooth. He held him and a struggle ensured between them. Other than the hoe the deceased had a knife. When they were struggling, the (sic) fell down at a place where there were tree stumps. Each of them went to their respective homes.

8. When Celestine Nabwire (PW1), the widow of the deceased testified, she was not confronted with the facts of the version tendered by the accused. This (sic) there is a clear indication that the defence of the accused was an afterthought. The version by the prosecution was at that time of postmortem, only one stab wound was noted on the left abdomen. The minor perforations were made during the medical intervention. This bolstered the version by the widow of how the incident occurred. I therefore dismiss the defence of the accused as an afterthought.

9. The medical evidence by Dr. Muchana (PW8) on behalf of Dr. Rosaline Malangachi was that the deceased died of cardiopulmonary arrest due to septicemia from the stab wound. It is evident therefore, that the prosecution proved to the required standards that the accused inflicted the fatal injuries to the deceased.

10. In order to establish the offence of murder, in addition to establishing that the accused caused the fatal blow, the prosecution must prove that an accused person charged with the murder had malice aforethought. This is the requisite mens rea for the of offence of murder. On malice aforethought section 206 of the Penal Code provides:

> 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.

The evidence of Celestine Nabwire (pW1) the widow of the deceased demonstrate that the accused returned a second time to their house the same night, while armed. When the deceased opened for him, she only heard him cry that the accused had stabbed him. It is evident that the trip was solely to stab the deceased. I therefore find that the stabbing of the deceased by the accused proved that he had the requisite mens rea. The offence of murder was proved beyond reasonable doubt.

11. From the foregoing analysis of the evidence on record, I find that the prosecution has proved the offence of murder contrary to section 204 of the Penal Code. I find him guilty and accordingly convict him.

8. The appellant, being dissatisfied with the judgment of the High Court, preferred the present appeal. In his memorandum of appeal dated 14th October, 2021, the appellant faulted the learned judge, for convicting him, relying only on the evidence of one witness, whose evidence was not sufficient to sustain the charge; failing to appreciate that the prosecution failed to establish the case beyond reasonable doubt; failing to appreciate that the trial took too long; and failing to consider the mitigation that was raised by the appellant during his sentencing.

9. In support of the appeal, the appellant filed written submissions through learned counsel Ms. Ochieng Bilha Erika. The appellant submitted that the learned judge relied on the evidence of a single witness, who was the deceased's wife, and whose evidence was not sufficient to convict the appellant of the offence of murder; that since Nabwire did not witness the assault, her evidence ought to have been corroborated by other key witnesses; that the learned judge relied on the evidence of Dr. Muchana which could not sufficiently corroborate

Nabwire's evidence as anyone could have stabbed the deceased and inflicted the fatal injuries; and that the trial Judge ought to have analyzed and weighed the testimony of all the prosecution witnesses.

10. The appellant further submitted, that the prosecution did not prove their case to the required standard. This is because, although the fact of death of the deceased is not disputed, his cause of death was in doubt. According to the postmortem report the deceased is indicated as having died from cardiopulmonary arrest due to septicemia arising from peritonitis and enterocutaneous fistula, while according to the evidence of Dr. Muchana the cause of death was severe infection arising from the abdomen. The trial Judge on his part misapprehended the evidence of Dr. Muchana by stating that the deceased died as a result of cardiopulmonary arrest due to septicemia from the stab wound, when neither the pathologist nor the postmortem report mentioned a stab wound. In addition, that the pathologist did not give any indication of the possible type of weapon/object that was used to inflict the injuries on the deceased, and no murder weapon was produced in evidence. The appellant maintained that Nabwire did not witness the appellant actually stabbing the deceased, and the evidence regarding the cause of death was merely circumstantial, which was not sufficient as the prosecution failed to connect the death of the deceased to the appellant. Moreover, the appellant did not attempt to flee but was arrested from his house.

11. On malice aforethought, it was established that there was no reason given by any of the prosecution witnesses as to why the appellant could have assaulted the deceased. The case of Charles Njonjo Gituro -vs- Republic [2019] eKLR, was cited for the proposition that in determining whether malice aforethought has been proved, the court should take into account factors such as part of the body injured, the type of the weapon used if any, type of injury inflicted upon the deceased, and the subsequent conduct of the deceased. It was submitted that these factors were not established and therefore, malice aforethought was not established.

12. The appellant argued that his rights to a fair trial under Article 50(2)(e) of *the Constitution* were violated as his trial took five years and the learned Judge ought to have considered this, in passing sentence. The appellant also relied on Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR, for the proposition that mandatory minimum sentence was unconstitutional, and that before passing sentence the court should give an accused person the opportunity to mitigate so as to inform itself on the proper sentence to be passed. The Court was urged to set aside the sentence of the appellant and refer the case back to the High Court for resentencing.

13. The respondent also filed written submissions through Ms. J. Busienei, Senior Principal Prosecution Counsel in the ODPP, in which it was submitted that the prosecution proved its case to the required standard; and that all the ingredients of the offence of murder, that is the death of the deceased, its cause, the identity of the person who killed him and whether the person had malice aforethought were all established as per the evidence of the eight prosecution witnesses who testified.

14. In addition, the respondent added that the witnesses who responded to Nabwire's screams confirmed that the deceased had a stab wound on his stomach, and used a lesso to tie the deceased's stomach, before rushing him to hospital; that there was sufficient light for the witnesses to see what was happening; that the deceased informed Vincent, Ekesa and Bernard, that it was the appellant who had stabbed him and inflicted the injury on him; that according to the postmortem report, the cause of death was cardiopulmonary arrest due to septicemia from stab wound; and therefore, the deceased died as a result of injuries inflicted on him by the appellant. There was, therefore, direct evidence that it was the appellant who stabbed the deceased.

15. The respondent maintained that malice aforethought was proved under section 206 of the Penal Code as the appellant went back to the house of the deceased while armed with a knife; that the second trip by the appellant was solely to stab the deceased, and the attack was vicious; and therefore, that appellant had the intention to cause death, or to do grievous harm to the deceased. In support of these submissions the respondent relied on Ali Salim Bahati & Another - vs- Republic [2019] eKLR.

16. In regard to sentence, the respondent taking cognizance of the Supreme Court's decision in Francis Karioko Muruatetu & Another -vs- Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR, (Muruatetu 2), conceded to the setting aside of the mandatory death sentence, as there was no indication on the court record of the appellant's mitigation. The respondent urged that the appellant be referred back to the High Court for resentencing.

17. This being a first appeal, this Court is mindful of its duty and obligation to re-analyze, re-evaluate and re-consider afresh, the evidence adduced before the trial court, and to arrive at its independent conclusion. This duty was well articulated by this Court in Erick Otieno Arum vs 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 analysed. 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 analyse 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. There are now a myriad of case law on this but the well-known Okeno vs Republic (1972) EA 32 will suffice."

18. We have carefully considered the record of appeal in its entirety, the rival submissions made by both parties, the authorities cited and the relevant law. Before considering the substantive issues in this appeal, we wish to address the appellant's complaint that his rights under Article 50 of *the Constitution* were violated, because his case took too long to be finalized. Our perusal of the record has revealed that the appellant's trial took about five years. This may appear like an unreasonably long period, however, the reason for this delay was partly because of the appellant's insistence that witnesses who had already testified be recalled under Section 200 of the Criminal Procedure Code, when the matter was taken over by another Judge. This resulted in a ruling dated 8th December, 2017, against which the State preferred an appeal. Two years later, the State withdrew the appeal. The appellant then changed his mind, and decided to proceed with the trial from where the previous Judge had left it. There were, therefore, good reasons for the matter taking long and the appellant's complaints in this regard are not justified.

19. The substantive issues that emerge for our determination are threefold. First, is whether the elements of the charge of murder were fully established, and the appellant proved to be the person who caused the death of the deceased with malice aforethought. Secondly, whether the trial Judge properly exercised his discretion in sentencing the appellant and whether there is justification for this Court to intervene.

20. Section 203 of the Penal Code under which the appellant was charged provides as follows:

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

21. This means that for a conviction of murder under section 203 of the Penal Code to be sound, the prosecution must have proved beyond reasonable doubt that it is the accused person who by an unlawful act or omission, caused the death of the deceased and that he did so with malice aforethought (See also Roba Galma Wario -vs- Republic [2015] eKLR).

22. In this case the death of the deceased is not substantially in dispute. It was proved by the evidence of Dr. Muchana who produced the postmortem examination report, and the evidence of Nabwire and Vincent both of whom testified that the deceased died on 8th April, 2014.

23. The issue is, what caused the death of the deceased. According to the postmortem report, Dr. Malangachi, who performed the autopsy, concluded that the cause of death was "cardiopulmonary arrest due to septicemia arising from peritonitis and enterocutaneous fistula." That conclusion, must be understood in light of her findings on examination of the body. Her observation in this regard included:

> " Stab wound seen on the left lumber region of the abdomen 4cm from the middle measuring 5X2cm; colostomy opening seen on the left ilsac forsa region measuring 5cm in diameter; multiple perforation on the abdominal wall seen, measuring 2cm and 1cm in diameter on the right side."

24. In his evidence, Dr. Muchana, who produced the postmortem report on behalf of Dr. Malangachi, summed up her opinion on the cause of death as severe infection arising from the abdomen. But he

also referred to the observation that had been made by Dr. Malagachi regarding the body having a stab wound on the left side of the abdomen. In his judgment, the trial Judge reiterated that the cause of death was cardiopulmonary arrest due to septicemia from the stab wound. It is evident that the postmortem examination revealed that there was a stab wound and the septicemia (severe infection) arose from that stab wound, and therefore, the conclusion by the learned Judge that the deceased died of cardiopulmonary arrest due to septicemia from the stab wound was not inconsistent with the evidence.

25. Although Nabwire did not exactly see the deceased being stabbed, she saw the deceased open the door, heard him scream that he had been stabbed by the appellant, and immediately come back into the house bleeding. The appellant is the one who had called out to the deceased to open the door. He had just been in the house some minutes earlier. In his defence, the appellant did not deny having gone to the house of the deceased. He implied that there was a confrontation between him and the deceased. We find that the evidence of Nabwire was clear that there was no confrontation as the deceased opened the door and immediately thereafter came back with the injury.

26. Moreover, the deceased stated to his mother in the presence of Nabwire and Vincent that it was the appellant who had stabbed him with a knife. He repeated that statement again to Ekesa and then to Bernard. This was about a month before he died. Under Section 33(a) of the *Evidence Act*, a statement made by a person who is dead is admissible where the statement relates to his death.

27. In Philip Nzaka Watu -vs- Republic [2016] eKLR, this Court considered the identification of an appellant by the deceased in a dying declaration, and had this to say:

> "The substantial question in this appeal relates to the dying declaration identifying the appellant as the deceased's assailant. The appellant submits that the dying declaration was never made and if it was, it amounted to hearsay evidence, which was inadmissible or was otherwise unreliable.
>
> Decisions of this Court abound on admission and reliance on a dying declaration. Suffice to mention only two, CHOGE V. REPUBLIC [1985] KLR1, KIHARA V. REPUBLIC [1986] KLR 473 and 2008. 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. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.
>
> Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction

founded on a death declaration is indeed safe. This Court expressed itself as follows in CHOGE V. REPUBLIC (supra):

> 'The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.'"

28. Likewise, the deceased herein is said to have made statements identifying the appellant as the person who stabbed him. This was important evidence that the trial Judge ought to have considered. The statement was made three times, and it was consistent with the evidence of Nabwire who heard the appellant knock the door a second time, and call out to the deceased to open the door, and the deceased was attacked immediately he opened the door. In addition, there was the evidence of Ekesa, who testified that as he was running to the home of the deceased in response to the screams, he saw the appellant running away from the home of the deceased. This confirms Nabwire's evidence that it was the appellant who had knocked the door and stabbed the deceased.

29. In his defence, the appellant attempted to imply that it was the deceased who had a knife. This could not have been true as the deceased was woken up from bed. The deceased's contention that he had been stabbed with a knife was consistent with the evidence of Vincent, Ekesa, Leo and Bernard regarding the injury that the deceased had on his abdomen. This was also consistent with the pathologist's observation during the autopsy. We, therefore, find that the evidence adduced was sufficient to prove that the appellant was the person who stabbed the deceased and caused the injury that led to the death of the deceased. It is evident that the knife was not recovered nor produced in evidence. But that is neither here nor there, as the evidence of the pathologist was clear that the deceased suffered stab wounds.

30. On malice aforethought, the appellant argued that no reason was given by any of the prosecution witnesses as to why he could have assaulted the deceased. Under section 206 (a) and (b) of the Penal Code, it is sufficient that the appellant had the intention to cause death of, or to do grievous harm to any person, and had knowledge that the act or omission would cause death or grievous harm to any person. In this case the appellant went to the house of the deceased armed with a knife. He had been there some minutes earlier and appears to have been offended because the deceased questioned why he should go to the deceased's house at such a late hour to ask for his hoe. When the door was opened, all he did was to stab the deceased. We are satisfied that by stabbing the deceased with a knife the appellant intended to cause death or grievous harm to the deceased and knew that his actions could result in such consequence. We are satisfied that malice aforethought was therefore established. All the ingredients having been proved, the appellant's conviction was safe and his appeal against conviction fails.

31. As regards the sentence, the respondent has conceded the appeal in this regard on the ground that the learned Judge did not give the appellant the opportunity to mitigate but simply imposed the mandatory death sentence. This concession was informed by the fact that that record of proceedings of the lower court did not contain any mitigation. We have perused the original file, and have come across

proceedings recorded on 13th June, 2019, which is the date the judgment was delivered. It is recorded as follows:

> " Accused – present.
>
> MM Achola – For accused.
>
> Court – The judgment was delivered and signed by me in open court in the presence of accused. Ms Achola for accused and Mr. Gichana prosecuting counsel.
>
> Mr. Gichana: May the accused be treated as a first offender.
>
> Ms. Achola: The accused is a first offender, he has been remorseful and has been in remand since 2014. He is a family man, I pray for leniency.
>
> Sentence: I have considered that the accused is a first offender and the mitigation proferred on his behalf. The circumstances of the case do not call for deviation from the prescribed sentence. I therefore sentence the accused to suffer death as prescribed by the law.
>
> R.A. 14 days.
>
> W. J. Kiarie
>
> 13th June, 2019."

32. The above shows that the contention that the appellant did not have the opportunity to mitigate was not correct. Nevertheless, it is evident from the above that the learned Judge did not consider the appellant's mitigation or the circumstances of the case, even as he ruled that "the circumstances of this case do not call for the deviation from the prescribed sentence." The death penalty is the maximum sentence provided for the offence of murder. It should be imposed in the most heinous circumstances. In this case, the learned Judge did not refer to any circumstances that can be described as heinous.

33. In Francis Karioko Muruatetu & Another -vs- Republic [2017] KESC 2 (KLR), the Supreme Court held that the mandatory nature of the death penalty provided under section 204 of the Penal Code for the offence of murder is unconstitutional. The Supreme Court observed that:

> "If a judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualized the circumstances of an offence or offender may result in the undesirable effect of "over punishing the convict"

34. In the circumstances before us, the learned Judge did not properly exercise his discretion as there was no justification for his imposing the death penalty. In Bernard Kimani Gacheru -vs- Republic [2002] eKLR, this Court stated:

> " It is now settled law following several authorities by this Court and by the High Court the sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and

that the appellate court might itself not have passed that sentence this alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist."

35. In the circumstances of this case, there is justification for this Court's intervention as the learned Judge did not consider the circumstances of the case, nor the mitigation of the appellant. The death sentence was harsh and totally unproportionate to the circumstances. Accordingly, we allow the appeal, set aside the sentence of death that was imposed on the appellant. The appellant having needlessly caused the death of the deceased, a sentence of thirty (30) years imprisonment would be appropriate. We have noticed from the record of the trial court, that from the time the appellant was arraigned in court, on 23rd April, 2014, he was only given bond of Kshs.500,000/-with two sureties on 14th March, 2016, but remained in custody as he was apparently unable to meet the bail terms.

36. The upshot of the above is that the appeal against conviction is dismissed, but the appeal against sentence is allowed, and the sentence of death substituted with the sentence of thirty (30) years imprisonment, which shall be computed from 23rd April, 2014, the date on which he was first arraigned in court.

Those shall be the orders of this Court.

DATED AND DELIVERED AT KISUMU THIS 15TH DAY OF NOVEMBER, 2024

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR