Gitahi v Republic (Criminal Appeal 28 of 2017)
[2024] KECA 1624 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1624 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 28 OF 2017

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

NOVEMBER 8, 2024

BETWEEN

PETER NGURE GITAHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Kerugoya (R. K. Limo, J.) dated 8th December, 2016 in HCCRC No. 6 of 2013)

JUDGMENT

1. The appellant, Peter Ngure Gitahi, was convicted for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that on 19th July, 2013, at Muthaiga Village within Kirinyaga County, he murdered Morgan Mudanya Gudari (the deceased).

2. At the trial court, the prosecution called nine (9) witnesses. Josephat Muremi Miano (PW1), testified that on 19th July, 2013 at around 7.30 pm, he was walking home in the company of the deceased when he (PW1) stopped to talk to a friend named Wachira. It was his further testimony that the deceased had informed him that he was planning to pass by the homestead of one Elizabeth Jepkorir Cheruiyot alias Mnandi (PW7) and he followed the deceased to PW7's homestead about 30 minutes later. PW1 further testified that just before he reached Mnandi's place he met the appellant who was well known to him, holding a panga walking fast saying that he had killed someone. It was his evidence that it was only upon reaching Mnandi's place and finding the deceased lying down, bleeding from cut wounds that it dawned on him that it was the deceased who the appellant had referred to. It was PW1's further evidence that the deceased had cuts on his head and mouth and he rushed to inform the deceased's wife, Sicily Wanjiru Chege (PW2) that her husband had suffered injuries.

3. It was his further evidence that with the help of other villagers he took the deceased to Comrade's Health Centre and thereafter to Embu General Hospital for medical attention. Further, that the

deceased was later transferred to Kenyatta National Hospital where he succumbed to the injuries on 22nd July, 2013.

4. Sicily Wanjiru Chege (PW2), testified that she was the deceased's wife and that the deceased was a pastor in a local church known as Periel Miracle Church. It was her evidence that on the material day, the deceased had gone to the said church for some church activities. It was her evidence that the appellant had sold her a parcel of land but later reneged on the deal and began troubling her and the deceased by cutting and destroying their crop on the disputed plot on two occasions. It was her further evidence that she had reported the incidences to the Chief and the land dispute between her and the appellant was pending at the chief's office. It was her further evidence that the appellant had threatened to cut her the way he had cut her crops and that on the material date she had gone to work on a different piece of land to avoid squabbles.

5. PW2 further testified that on the material day at about 7.30 pm Mnandi (PW7) rushed to her home and informed her that the deceased had been attacked by the appellant who she referred to as Wamasara who was armed with a panga. From the record, this was the appellant's nickname. It was PW2's evidence that she rushed to the scene in the company of Mnandi and found the deceased lying down bleeding from cuts on the head and mouth. It was her testimony that she screamed whereupon many people arrived at the scene and helped to take the deceased for treatment.

6. It was PW2's further evidence that the deceased may have been attacked due to differences between her and the appellant over the piece of land that the appellant had sold to her. It was her evidence that the appellant had in April, 2013 cut and destroyed her maize crop on her piece of land.

   Further, that on 18th July, 2013, the day before the murder incident, the appellant had cut and destroyed her cowpeas crop and threatened to cut her up as well. It was her testimony that she had reported the incident to the Area Chief who had given her a letter summoning the appellant to his office.

7. Judy Wambui Njoroge (PW3) testified and corroborated PW2's evidence.

   It was her evidence that she was the Village in Charge. That PW2 had reported to her in April, 2013 that Wamasara (the appellant) had destroyed her maize crop and that upon making the complaint, she proceeded with the appellant and PW2 to the farm to assess the destruction whereupon the appellant agreed to compensate PW2 the sum of Ksh. 900 for the destruction. It was her further evidence that on 18th July, 2013, PW2 reported that the appellant had destroyed cowpeas in her parcel of land. PW3 testified that she directed PW2 to report the matter to the Area Chief who wrote a letter summoning the appellant to report to her office on 22nd July, 2013.

8. It was PW3's further evidence that on 20th July 2013, the appellant reported to her that "nimekatakata Morgan" (Loosely translated to "I have injured Morgan"). That she called the Assistant Chief and the Area Chief who advised her to go to Wanguru Police Station and report the matter, which she proceeded to do. In cross examination PW3 testified that she handed a letter from the Chief summoning the appellant to the Chief's office in respect of the dispute between PW2 and the appellant relating to the destruction of PW2's crop by the appellant. It was PW3's further evidence that she read the Chief's letter to the appellant and handed it over to him on 19th July, 2013.

9. Joshua Gachoki Musyili (PW4) testified that he was a farmer and that on the material day he was at his home when the deceased called him and informed him some items in their church required repair. That he proceeded to carry out the necessary repairs and left the appellant at the church. It was his further evidence that at about 7.30pm on the same day, he received a call from PW2 informing him that the deceased had been injured and that she and others were proceeding to the hospital.

10. Alexander Timothy Kinyua (PW5) testified that on the material date at around 8p.m he had gone to Mnandi's place for a drink and while there, he witnessed the appellant cutting the deceased who he knew as a pastor. It was PW5's testimony that when the appellant cut the deceased, the deceased stated: "Ngai, why have you cut me?" That when he enquired from the appellant why he was injuring the deceased, the appellant insulted him and threatened him that "... nawesa kata kata hata wewe". (I can also cut you up). It was PW5's further testimony that the appellant insulted him with obscene and abusive words in the Kikuyu language as a result of which, sensing danger, he ran away. It was his further evidence that he returned to the scene when he heard screams whereupon he found the deceased lying down, with deep cuts on the head, forehead and the bridge of the nose. It was his further evidence that the appellant and the deceased had a dispute over a parcel of land.

11. Dr. Mary Mungania (PW 6), the pathologist who performed the post mortem examination on the body of the deceased on 1st August, 2013 at Kenyatta National Hospital testified that the deceased had suffered deep cuts on the right cheek, nose and upper lip. Further, that the body also had a deep cut wound on the left side of the face. It was her opinion that the cause of death was severe head injury caused by a sharp force directed on the mentioned parts of the body. PW6 produced the post mortem report.

12. Elizabeth Jepkorir Cheruiyot (PW7) alias Mnandi, testified that she used to make and sell 'changaa' among other illicit brews at her homestead. It was her evidence that she knew the deceased as a friend and a customer. That on the material day while at her house which was close to a public road, she noticed the deceased passing by and called out to him. PW7 testified that the deceased went into her compound and ordered a drink, which he drank, outside her house. It was her evidence that prior to the attack she had sold a drink to the appellant and had left him with the deceased outside her house.

13. It was her further evidence that about 10 minutes later while she was inside her house, she heard the appellant who she knew as Wamasara quarrelling the deceased telling him that "leo utaniona sitakuwacha" (today you will see me – I will not spare you). It was her evidence that she knew the appellant well and could recognize his voice. Further, that she then heard a thud whereupon she came out of the house and found the deceased lying down bleeding. It was her further evidence that upon seeing the state in which the deceased was, she rushed to inform PW2 who proceeded to the scene screaming thereby attracting other people to the scene. It was her further evidence that PW2 and a few other people took the deceased for medical treatment. It was her evidence that the deceased asked why the appellant had inflicted injuries to him. PW7 testified that she knew the appellant well as she had leased a parcel of land from him for 3 years and the appellant used to collect rent from her every month.

14. Sergent Loice Wanjiku Mwangi, No. 60125 (PW8) was the Investigating Officer. It was her evidence that on the material day she was at the police station when the initial report was made at Wanguru Police Station by PW2 to the effect that the appellant had assaulted the deceased. It was her further evidence that on 23rd July, 2013 PW2 returned to the station and informed her that the deceased had succumbed to his injuries. PW8 testified that she visited the scene in the company of another police officer and recorded statements from witnesses. It was her evidence that she was unable to find the murder weapon and that the appellant surrendered himself and went to the Police Station on 26th August, 2013. It was her evidence that the appellant reported that he had assaulted a person who he referred to as "pastor" but that he subsequently retracted his confession and she did not therefore record it.

15. In his defence, the appellant gave an unsworn statement and denied killing the deceased and raised an alibi defence. He stated that on the material date he was away at a place called Gathigiriri at his sister's home where he had gone to plant paddy rice and keep birds at bay. He conceded that he had agreed to compensate a neighbour with Kshs.900 for destroying her crop. He explained that his cattle had

strayed into the neighbour's farm and destroyed her crop while running away from a swarm of bees. It was his further statement that when he went back to his home he was informed that the owner of the destroyed crops had demanded payment of Kshs.900 as compensation and that he was required to report at Wanguru Police Station in view of the fact that he had failed to pay the agreed compensation.

16. The appellant further stated that as he was reporting to the Police Station on his failure to pay the compensation for the crop destruction he was arrested and urged to explain where he was on the material day. He maintained that he was away from the scene of murder from 15th July, 2013 until 25th July, 2013. He however conceded that he visited Mnandi's place once in a while for a local drink. The appellant conceded that he signed some papers while at the police station but stated that he did not read them and neither were they read to him. It was his further evidence that he was subsequently arraigned before the trial court and charged with the offence of murder.

17. The trial court considered the evidence an convicted the appellant for the offence of murder. On sentence, the trial court stated as follows:

> " I have considered the mitigation advanced but the law provides for one sentence. My hands are tied. Under Section 204 of the Penal Code the accused is hereby sentenced to death as provided by law."

18. Aggrieved by the conviction and sentence, the appellant filed an appeal to this Court raising the following grounds of appeal:

    a. that the trial court erred in law and in fact when it failed to find that the prosecution evidence was insufficient to sustain a conviction; and

    b. that the sentence meted out by the trial court was grave and excessive in the circumstances of this case.

Submissions by Counsel

19. When the appeal came up for hearing, learned counsel Mr. Magua appeared for the appellant, while learned counsel, Mr. Naulikha, the Assistant Director of Public Prosecutions appeared for the State. Both counsel relied on their written submissions with brief oral highlights.

20. On the ground whether the prosecution evidence was sufficient to sustain the conviction, Mr. Magua submitted that the appellant's conviction was based on a narrative that he confessed to the crime. Counsel submitted that PW8, the Investigating Officer testified that the appellant presented himself to the police station and reported that he had assaulted the deceased. Further, that PW8 testified that the statement made by the appellant was a confession but that she did not record it. Counsel asserted that the fact that all other prosecution witnesses recorded their statements after 26th July, 2013 gives credence to counsel's submission that the prosecution evidence sought to add weight to the purported confession.

21. Counsel asserted that the purported confession was inadmissible as it did not comply with Sections 25, 25A and 26 of the *Evidence Act* with regard to instances where a confession can be admissible in court. Counsel emphasized that the purported confession was never recorded in writing as required in law. Counsel further raised issue with the fact that the confession was made before the Investigating Officer who at the time of trial was of the rank of Corporal. Counsel asserted that this was contrary to Section 25 of the *Evidence Act*. Further, that Section 29 of the *Evidence Act* outlaws confessions made to police officers unless such police officers are of above the rank or a rank equivalent to an Inspector General or an administrative officer holding first or second class Magisterial powers acting in the capacity of a

police officer. In counsel's opinion, the purported confession was treated casually and cannot form the basis of the appellant's conviction.

22. Counsel further submitted that the investigations into the murder were poorly conducted and that the police only took action after the deceased succumbed to the injuries inflicted upon him despite the fact that the assault had been reported earlier. Counsel submitted that the scene of crime had been interfered with. Further, that witnesses could not be traced including PW7 who was considered an eyewitness to the incident. In counsel's opinion, the fact that PW7 disappeared after the incident raised suspicion regarding who killed the deceased.

23. Counsel further submitted that the alleged murder weapon was never recovered yet it would have been of great evidentiary value to the prosecution case. Further, that had DNA testing been conducted upon dusting the murder weapon, this would have assisted the trial court arrive at a just determination of the case.

24. Counsel emphasized that the fact that there was a grudge between the appellant and the deceased was not sufficient proof of malice aforethought. Counsel asserted that the evidence by the prosecution was not credible as nearly all the prosecution witnesses such as PW1, PW5 and PW7 were all self-confessed good friends of the deceased. Further, that PW7 was a suspect and was therefore inclined to side with the prosecution witnesses so as to erase any suspicion and thereby exonerate herself as a suspect. Counsel asserted that the prosecution witnesses were not credible and their evidence ought to have been treated with caution, which in the circumstances of this case, was not done.

25. Regarding sentence, counsel relied on the Supreme Court case of Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR (the Muruatetu case) and submitted that the mandatory death sentence meted on the appellant was excessive and unconstitutional. Counsel took cognizance of the fact that the impugned judgment was delivered before the Supreme Court determined the Muruatetu case. Counsel submitted that the Muruatetu case held that the mandatory sentence of death stipulated in Section 203 and 204 of the Penal Code deprive courts of their unfettered jurisdiction to exercise discretion and impose appropriate sentence on a case-to-case basis. Counsel emphasized that on the basis of the Muruatetu case, this Court has the discretion to sentence convicted persons for capital offences and is not constrained by the mandatory nature of sentencing. Counsel urged this Court to allow the appeal against conviction and sentence.

26. In opposing the appeal, Mr. Naulikha, submitted on the two grounds of appeal. Counsel emphasized that the testimonies of prosecution witnesses including PW1, PW5, and PW7 were critical in placing the appellant at the crime scene on the material date, place and time. Counsel asserted that the appellant while attacking the deceased at the house and compound of PW7 in the presence of PW5 had an altercation with PW5 to the extent of threatening him if he dared question him why he was attacking the deceased.

27. Counsel invited us to examine the post mortem report and take cognizance of the body parts that the appellant targeted on the body of the deceased, which were the head and the mouth. Counsel emphasized that these are very delicate, sensitive and vital human body organs and therefore by attacking those organs, it is evident that the appellant intended to cause grievous bodily harm or serious long lasting or life- threatening injuries. Counsel asserted that this demonstrates malice aforethought on the part of the appellant as enshrined in Section 206 of the Penal Code.

28. Counsel submitted that PW3 corroborated PW2's testimony that there was a long-standing land dispute between the appellant and the deceased's wife (PW2). Counsel further submitted that the land dispute was pending before the Area Chief when the incident occurred leading to the death of the deceased. Counsel refuted the contention by counsel for the appellant that the prosecution

evidence on record was insufficient and that the appellant's conviction was therefore unsafe. Counsel submitted that from the record, the prosecution evidence was sufficient, direct, strong, circumstantial, overwhelming, and reliable and corroborated each other in all material aspects. Counsel asserted that there were no inconsistencies or contradictions in the evidence presented by the prosecution.

29. Counsel refuted the contention by counsel for the appellant that the sentence imposed by the trial court was excessive in the circumstances of this case. Counsel asserted that the sentence is not excessive, punitive or grave as the trial court took into account the aggravating as well as mitigating circumstances before coming to the conclusion that the befitting sentence was that the appellant be sentenced to suffer death as provided for under Section 204 of the Penal Code. Counsel submitted that the appellant planned the attack on the deceased and had on two occasions in the past destroyed crops belong to the deceased's wife' (PW2) and had been ordered to pay Kshs.900 as compensation for the destruction of the crop but conceded in his defence that he had not yet paid the said amount. Counsel asserted that the land dispute was between the appellant and PW2 yet the appellant took out his anger on the deceased who was innocent and had nothing to do with the outstanding dispute between the appellant and PW2.

30. Counsel further submitted that the trial court did not err when it found that given the cruel, painful and inhuman manner the deceased met his untimely and unfortunate death, the death sentence meted out on the appellant is just, proper and appropriate in the specific circumstances of this case.

31. Counsel urged this Court to be guided by the Supreme Court guidelines in Francis Karioko Muruatetu & Another (supra), which did not make the death sentence illegal or unconstitutional. Counsel asserted that the courts are therefore at liberty to impose the death sentence depending on the totality of the circumstances of the case, as the court may deem fit and proper. Counsel urged us to uphold the trial court's findings and to dismiss the appeal both on conviction and sentence.

Determination

32. As this is a first appeal, we are mandated to re-evaluate and re-analyze the evidence before the trial Court, while bearing in mind that we did not have the occasion to see or hear the witnesses. In the case of Chiragu & another v Republic [2021] KECA 342 (KLR), this Court stated that:

> However, before we grapple with grounds of appeal aforesaid, we must remind ourselves that this being a first appeal from the judgment of the High Court, by dint of section 379 of the CPC and guidance provided in the famous case of Okeno V. R. [1972] EA 32, we are expected to subject the entire evidence tendered in the trial court to fresh and exhaustive examination so as to reach our own independent conclusions as to the guilt or otherwise of the appellants. In doing so, we must however give due allowance to the fact that we neither saw nor observed the witnesses as they testified. Accordingly, we must give way to the findings of facts and demeanor of witnesses by the trial court. See also Erick Otieno Arun V. Republic [2006] eKLR. In undertaking this exercise, we must of necessity go over the evidence presented before trial court albeit in summary."

33. We discern the issues arising for determination to be whether: the prosecution proved its case against the appellant beyond any reasonable doubt; and whether this Court should exercise its discretion and interfere with the death sentence imposed on the appellant.

34. As regards the first issue, Section 203 of the Penal Code defines the offence of murder in the following terms:

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

35. It follows therefore, that to sustain a charge under the said provision, the prosecution had to prove beyond reasonable doubt, the fact and cause of death of the deceased person; that the death of the deceased was as a result of an unlawful act or omission on the part of the accused person; and that such an unlawful act or omission was committed with malice aforethought.

36. It is not in dispute that the deceased died. The evidence of PW6, the Pathologist who conducted the post mortem examination on the body of the deceased confirmed the death of the deceased. In PW6's opinion, the cause of death of the deceased was severe head injury caused by a sharp force directed on deep cuts on the right cheek, nose, upper lip and on the left side of the face.

37. The questions that we are called upon to determine are therefore whether the death of the deceased occurred as a result of the unlawful act or omission of the appellant; and whether there was malice aforethought.

38. PW1 testified that he met the appellant whom he added was well known to him, holding a panga walking fast saying that he had killed somebody. It was his evidence that upon reaching Mnandi's place he found the deceased lying down bleeding from cut wounds.

39. PW7 testified that on the material day the deceased went to her homestead and ordered a drink, which he drank outside her house. It was her evidence that while she was inside her house she heard the appellant quarrelling with the deceased threatening him. She then heard a thud and upon going outside her house she found the deceased lying down bleeding from the mouth and the back of his head. PW7 was categorical that she heard the appellant threaten the deceased and that she knew the appellant very well and could recognize his voice. She testified that "I heard him (the appellant) say in Kiswahili: "leo utaniona. Sitakuwacha." It was her further evidence that "I can tell the court that Wamasara caused or inflicted the injuries... I knew it was him (the appellant) threatening the deceased."

40. Alexander Timothy Kinyua (PW5) testified that on the material date at around 8p.m. while at PW7's home he witnessed the accused cutting the deceased. He testified that: "Wamasara (the accused) came behind with a panga and cut the pastor with a machete...the accused kept cutting the pastor." It was PW5's testimony that upon confronting the appellant why he was attacking the deceased whereupon, the appellant threatened and insulted him. That sensing danger, he went away and returned upon hearing screams from Mnandi's homestead. That upon his return to Mnandi's place he found the deceased on the ground with blood oozing from the forehead and the bridge of the nose. PW5 further testified that he, PW2, PW7, PW1 and others proceeded to take the deceased to the hospital for treatment.

41. In the instant case, from the record, prior to the incident, the appellant was armed with a panga. PW1 testified that he saw the appellant holding a panga while PW5 testified that he saw the appellant cutting the deceased with a machete. A panga or machete is no doubt a dangerous weapon. It is clear that the appellant intended to cause the deceased grievous harm as from the record, he cut him on the head, face, cheek where critical body organs are located.

42. PW1, PW5 and PW7 were, therefore, eyewitnesses who were well known to the appellant and identified him as the perpetrator. We therefore find that the High Court did not err when it found

that the evidence of PW1, PW5 and PW7 corroborated each other and taken together point to the appellant as the person who inflicted the fatal injuries on the deceased.

43. From the foregoing, we are satisfied that it was the appellant who cut the deceased, causing him fatal injuries. From the evidence of the prosecution witnesses, including PW1, PW5 and PW7 there was s u f f i c i e n t light that illuminated the scene at about 7:30pm. The appellant was well known to PW1, PW5 and PW7 and there was therefore no error in their identification of the appellant as the perpetrator who inflicted fatal injuries to the deceased.

44. On the question whether the appellant had malice aforethought when he killed the deceased, Section 206 of the Penal Code provides that:-

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -
>
> 1. 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;
>
> 2. 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;
>
> 3. An intent to commit a felony;
>
> 4. 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."

45. In the case of Nzuki vs Republic [1993] eKLR, this Court defined malice aforethought as:

> " ...a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of Regina v Vickers, [1957] 2 QB 664 at page 670. An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of Conliffe v Goodman, [1950] 2 KB 237."

46. In the same case, this Court went on to state:

> " 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 these acts, and commits those acts deliberately

and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.

Without an intention of one of these three types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder. See the case of Hyam v Director of Public Prosecutions, [1975] AC 55."

47. Further, in Republic vs Tubere S/O Ochen (1945) 12 EACA 63, the then Eastern Africa Court of Appeal, set out the following factors to be considered in determining whether malice aforethought has been established;

> " 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 injuries; the conduct of the accused before, during and after the incident."

48. We find that in the circumstances, the High Court did not err when it held that the appellant's actions were aimed at the deceased and were intended to cause death or grievous harm. Further, the appellant's action of departing from the crime scene and fleeing from the area are wanting. The incident occurred on 19th July, 2013 and the appellant was sighted in the same area on the same date with the deceased at Mnandi's place where he had been served with drink by PW7 who had also served the deceased with a drink. This was on the same day and we cannot help but draw an inference that the appellant's actions are in tandem with the actions of a guilty mind and not consistent with that of an innocent one.

49. From the record, the evidence adduced by PW2, the wife of the deceased showed that the appellant sold to her a piece of land but later appeared to renege on the deal by engaging in destructive activities. PW2 testified that in April 2013 the appellant destroyed her maize crops on the said piece of land. PW2 testified that she reported the incident to the Area in Charge (PW3) who resolved the dispute between the parties after the appellant agreed to pay Kshs.900 as compensation for the destruction. The evidence of PW3 corroborated this evidence. PW2 further testified that on 18th July, 2013 the appellant destroyed cowpeas growing on her farm and threatened to cut her the same way he had cut the crops. PW2 further testified that she reported the incident to the Village in Charge who referred her to the Area Chief. It is notable that the letter issued by the Chief summoning the appellant on 22nd July 2013 was read and handed to the appellant by PW3. It is notable that the evidence of PW3 corroborated the evidence of PW2 regarding the land dispute between the appellant and PW2.

50. It was PW3's evidence that on 20th July, 2013 the appellant went and informed her that "nimekata kata Morgan." The Village in Charge subsequently found that indeed the deceased had been seriously injured. The evidence of PW2, PW3 and PW7 clearly established the element of malice aforethought on the part of the appellant.

51. In his defence, the appellant conceded that he was required by the Area in Charge to compensate PW2 for the destruction of her crops at an agreed amount of Kshs.900. The appellant in his unsworn statement of defence stated that on 4th July, 2013 his oxen were resting when a group of school children disturbed a swarm of bees, which stung his oxen which led his oxen to destroy the neighbour's maize crop. The trial court found the appellant's narration to be unreal as it was unlikely that the bees only stung the appellant's oxen leading them to cause loss and destruction on PW2's farm. The trial court

found that the appellant's narrative was not credible on this aspect. In the circumstances, we find that the trial court did not err in finding as it did.

52. Regarding the purported confession by the appellant, counsel for the appellant made heavy weather of the fact that the confession was not admissible. The trial court found, correctly in our view, that there was sufficient evidence to sustain the conviction without considering the retracted confession.

53. The appellant raised the defence of alibi that he was at his sister's home from 15th July, 2015 to 25th July, 2015 and was, therefore, not at the scene on the material day. In the circumstances of this case, we find that the prosecution evidence was overwhelming and placed him at the scene on the material day and time. Accordingly, we are satisfied that the prosecution proved the offence of murder beyond any reasonable doubt and the appeal against conviction lacks merit. Accordingly, the appeal against conviction fails and is dismissed.

54. As regards the sentence, the appellant was sentenced to death upon his conviction. The learned trial Judge noted that the death sentence, at that time, was the prescribed mandatory sentence for accused persons convicted of the offence of murder. The position has since changed after the Supreme Court, in the case Francis Karioko Muruatetu & Another v. Republic [2017] eKLR (Muruatetu case) outlawed the mandatory nature of the death penalty prescribed under Section 204 of the Penal Code.

55. The Supreme Court in the Muruatetu case pronounced itself as follows:

> "Consequently, we find that section 204 of the penal code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty...It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For avoidance of doubt, the sentence re-hearing we have allowed applies only to the two petitioners herein ..."

56. In mitigation, counsel for the appellant stated that the appellant was an elderly man and had been in custody since he was apprehended in 2013. The appellant prayed for leniency.

57. The trial court gave due consideration to the appellant's mitigation and the circumstances under which the offence was committed. From the record, the appellant premeditated the attack on the deceased.

58. In the circumstances, we find that the appellant was aware of his actions and his intention was to either kill the deceased or cause him grievous bodily harm. The nature of the offence and the manner in which it was executed are notable. The appellant without any provocation attacked and fatally injured the deceased in a most heinous attack using a panga.

59. The trial court was constrained to impose the death sentence prescribed by the law, which was mandatory at the time. However, guided by the decision of the Supreme Court in the Muruatetu case (supra), we are inclined to interfere with the sentence. We have considered the mitigation tendered before the trial court that the appellant was elderly and has been in custody since he was apprehended in 2013. Upon due consideration of the facts of the case, we find it fitting to interfere with the sentence.

60. In the circumstances, we allow the appeal against sentence. We hereby substitute the death sentence imposed on the appellant with a prison term of forty (40) years from 13th August, 2013 when he was first arraigned in court.

61. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 8TH DAY OF NOVEMBER, 2024.

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR