



**Muruva v Republic (Criminal Appeal E062 of 2022)
[2024] KECA 1786 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1786 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL E062 OF 2022
FA OCHIENG, LA ACHODE & WK KORIR, JJA
DECEMBER 6, 2024**

BETWEEN

BERNARD MURUVA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the judgment of the High Court at Eldoret,
(Githua J) delivered on 26th June 2018 in Criminal case No. 68 of 2011)*

JUDGMENT

1. Bernard Muruva the appellant, was charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars were that on 6th October 2011, at Siksik village in Nandi Central District within Nandi County, he murdered Japheth Miheso Serede.
2. The appellant denied the charges and the prosecution presented fourteen witnesses to prove their case. We have summarized the case before the trial court to bring this appeal into perspective.
3. The case for the prosecution case was that the deceased was a teacher at Siksik Primary School. On the material day at about 3pm, Vincent Adanga (PW1), and his friend both learners in the school, went to a nearby river to drink some water. The appellant appeared and told him to drink the water quickly and depart from the place. He knew the appellant very well as they used to play football together.
4. Presently, PW1 also saw the deceased who was a teacher in the school coming towards the river. He quickly hid in the nearby bush to avoid being seen by the deceased. While in the bush he saw the deceased and the appellant talking. Suddenly he saw the appellant cut the deceased on the right hand. The deceased took out some money and a mobile phone and offered them to the appellant. Instead of taking the items the appellant cut off the deceased's head with a machete and threw his lifeless body into the river. He then put the head in a white sack that he was carrying. PW1 ran towards the school



shouting to all and sundry along the way about the macabre incident he had just witnessed. The people also started screaming.

5. Francis Obimbo Temu, (PW2) heard the screams and ran towards the river, where he saw the deceased's headless body in the river. He also saw the appellant running away from the scene with a machete raised high. He had known the appellant since childhood as they were village mates. He joined the rest of the people in chasing after the appellant.
6. Meshack Hesbon, (PW8) was walking along a foot path near the school on the material day at about 3p.m. As he neared the river he saw the appellant holding a human head preparing to put it into a sack. He screamed and started throwing stones at the appellant. Collins Muzambi (PW7), heard him and joined him in pelting the appellant, causing him to drop the sack and run towards Kapkagani Administration Police Post.
7. Jackson Marengi, (PW6) and Rebeca Siringi (PW4) saw the pupils chasing after the appellant who was carrying a machete, a mobile phone and a blood-stained sack. Christopher Kiplangat Kitur (PW11), was the Area Chief to whom the appellant surrendered a blood stained machete and he in turn, handed it to Corporal Jonathan Leting (PW14), who was in charge of the Police post.
8. Dr. Sang Titus (PW10) a doctor at Kapsabet County Referral Hospital, produced the postmortem report prepared by Dr. Kiplangat for the deceased. The report indicated that the body had severe facial and head injuries and the head had been severed from the rest of the body. The doctor concluded that the cause of death was multiple cut wounds resulting to severe head and neck injuries.
9. Anne Wangechi Nderitu (PW13), Government Analyst, analyzed the gunny bag, T-shirt and the machete tendered in evidence. She found that the T-shirt and the gunny bag were heavily stained with human blood, but the machete had light blood stains. An attempt to generate DNA profile from the gunny bag was unsuccessful. However, the DNA profiles generated from the blood stains on the machete and the T-shirt matched the DNA profile generated from the blood sample indicated to belong to the appellant.
10. When put on his defence at the close of the prosecution case, the appellant testified on oath and did not call any witnesses. His defence was that he was arrested on the material day by undisclosed administration police officers, for no apparent reason as he emerged from a hotel at Kapkagani Trading Centre.

He was then taken to Kapkagani Police Post and later to Kapsabet Police station. While he was in the police station he was told to record a statement about the murder of the deceased. He refused to do so since he knew nothing about it.

11. In a judgment delivered on 26th June 2018, Githua J found the appellant guilty as charged and sentenced him to life imprisonment. The appellant was aggrieved by the conviction and sentence and he filed the instant appeal. The grounds in the memorandum and supplementary memorandum of appeal are that:
 - i. The evidence adduced against him fell short of the standard of proof in criminal cases.
 - ii. The failure of the investigating officer to tender evidence was fatal to the prosecution case.
 - iii. There were fatal contradictions in the prosecution case.
 - iv. The court disregarded the evidence of PW13 who was an expert witness.
 - v. There was no nexus between the exhibits adduced and the offence: and,



- vi. The court disregarded the appellant's defence.
 - vii. That the imposition of the mandatory indeterminate life sentence meted upon him was unjustifiable discrimination, unfair and repugnant to the principles of equity as enshrined under Article 27 and 28 of *the Constitution* of Kenya 2010.
12. The firm of Ms. Oduor Munyua and Gerald Attorneys filed written submissions dated 4th March 2024 on behalf of the appellant. Counsel urged that none of the witnesses from PW2 to PW14 saw the appellant commit the heinous act. That the sole witness who allegedly saw the appellant commit the act was PW1, and his testimony raised a lot of doubt which tilts in favour of the appellant. That the exact position where PW1 was, raised eyebrows as at one point he alleges to have hidden in a bush for fear of being seen by the deceased, while during cross examination he states that: "I turned after the teacher passed by after I heard him talk to the accused".
 13. Counsel submitted that there was no conclusive evidence that it was the appellant who was at the scene as portrayed by PW1. That there was no corroboration of PW1's assertion, and the findings of PW13 confirmed that the deceased's blood sample was not found on the murder weapon. Also, that no blood samples could be retrieved from the gunny bag, to confirm to whom it belonged.
 14. Counsel urged that the evidence of the investigating officer was crucial to link the appellant to the crime scene, the gunny bag, the report from the government chemist and to explain why the appellant's defence was not plausible. He asserted that failure to call the investigating officer was therefore, fatal to the case for the prosecution.
 15. On the sentence, counsel relied on this Court's decision in *Julious Kitsao Manyeso v Republic (2023) KECA* in which it was held that the imposition of a mandatory indeterminate life sentence is an unjustifiable discrimination and unfair violation of human dignity. Counsel urged this Court to order for a sentence re-hearing to give the appellant a chance to submit on sentencing based on the Judiciary of Kenya Sentencing Policy guidelines, 2016 for a fair sentence to be imposed.
 16. In rebuttal, Mark K. Mugun, Senior Prosecution Counsel filed submissions dated 26th February 2024 on behalf of the respondent and urged that this was a case of recognition, and not identification as PW1 knew the appellant very well. He relied on the decision in *Reuben Taabu Anjononi & 2 Others v Republic (1980) eKLR* where this Court held that recognition is much better, much more satisfactory, more reassuring, more believable and reliable than identification of a stranger, because it involves personal knowledge of the assailant in one way or another. Further, that the circumstances favoring recognition were enhanced by the fact that the incident occurred in broad daylight, and the appellant spoke to PW1 just prior to the incident.
 17. On malice aforethought, it was urged that the appellant struck the deceased with the machete numerous times causing him to sustain injuries on the neck, the right hand, elbow and lower humerus, deep cut wounds on the neck, lower jaw and completely severing the head from the body. That the appellant persisted in his endeavour, therefore, he clearly intended for those machete strikes to kill the deceased, or at the very least, cause him grievous harm. Counsel posited that mens rea can also be inferred from the fact that immediately before the murder, the appellant ordered the children to leave the scene. He calculated and took steps to waylay the deceased, a teacher, on his way to school.
 18. The prosecution relied on the decision of this Court in *Columbus Dindi Okoth v Republic (2008) eKLR* to demonstrate that adverse inference should not be drawn from their failure to call the investigating officer as a witness. It was urged that the offence of murder had been successfully and satisfactorily proved, and nothing suggests that had the investigating officer testified, his testimony would have been unfavourable to the prosecution.



19. On the DNA analysis produced by PW13, counsel urged that the judge disagreed with the expert's conclusion, for the reason that there was either a mix up of the labelling, or a deliberate interference with the blood samples. Thus, the judge did not rely on the DNA evidence to reach the conviction.
20. On sentence counsel submitted that the learned judge considered the appellant's mitigation and also the fact that a teacher needlessly lost his life in a brutal manner. That life imprisonment was found to be the most befitting sentence. He referred to the decision in *Bernard Kimani Gacheru v Republic* (2002) eKLR which set the principles upon which an appellate court can interfere with the sentence of the trial court.
21. Our mandate as a Court of first appeal, is set out in rule 31 (1) of this Court's Rules and it requires us to re-appraise the evidence and draw inferences of fact on the guilt, or otherwise of the appellant. This Court addressing this mandate in *Issac Ng'ang'a alias Peter Ng'ang'a Kabiga v Republic, Criminal Appeal No. 272 of 2005* held that:

“In the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze 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 demeanor and so the first appellate court would give allowance of the same.”
22. We have considered the record and grounds of appeal, together with the rival submissions and the law. In our view, the issues that fall for our consideration are whether the prosecution proved all the elements of murder beyond reasonable doubt, and if so, whether the sentence meted upon the appellant is unconstitutional.
23. The appellant was charged with murder contrary to Section 203 of the Penal Code which provides that:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”
24. Therefore, to sustain a murder charge, the prosecution must prove beyond reasonable doubt, the fact of the death of the deceased person; that the death of the deceased was caused by 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.
25. This Court set out these elements in its decision in *Anthony Ndegwa Ngari v Republic* (2014) eKLR

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought. (See *Nyambura & Others-vs-Republic*, [2001] KLR 355).”
26. In the present case, it is not contested that the deceased's life was prematurely snuffed out through an unlawful act. This is evident from the postmortem report compiled by Dr. Kiplagat and tendered in evidence by PW10. The vital questions that we must answer are whether the prosecution proved beyond reasonable doubt; that it was the appellant who slew the deceased, and if so, whether he harbored malice forethought.



27. PW1 testified that just before the appellant committed the heinous act, he spoke to PW1 and another pupil, bidding them to drink the water quickly and depart from the scene. PW1 took refuge in a bush nearby when he saw the deceased who was his teacher approaching. This we surmise, was because he was outside the school during school time. It was from this vantage point in the bush that PW1 saw the appellant cut the deceased on the hand before decapitating him.
28. It is in evidence that the incident happened in broad day light, at about 3p.m. and there was nothing to hamper visibility. Further, that the appellant and PW1 were well known to each other as they used to play football together. Identification was therefore by recognition.
29. For the weight to be placed on the evidence of recognition, we refer to this Court's decision in *Anjononi and Others vs The Republic* [1980] KLR where it was held thus:

“This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other”.

30. PW1's evidence was corroborated by PW8 who saw the appellant stashing the decapitated head in a gunny bag, and PW2 who saw the appellant fleeing from the crime scene with a machete held high. PW4, PW6 and PW7 were among the people who assisted in chasing after the appellant when they heard the screams from PW1 and heard that the appellant had slain the deceased. The chain of events from the time the appellant addressed PW1 at the river to the point where he surrendered to the Area Chief with the witnesses in hot pursuit was unbroken.
31. We are therefore, satisfied that the prosecution's case read as a whole presents a ring of truth and the discrepancies pointed out by the appellant are minor. We are guided by the comparative decision of the Supreme Court of India in *State of U.P. vs. M.K. Anthony*; Criminal Appeal No. 19 of 1976 where it was held thus:

“Appreciation of evidence, the approach must be whether the evidence of the witness read as a whole, appears to have a ring of truth. Once that impression is formed, the Court should scrutinize the evidence keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by him and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper- technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.”

32. On whether the evidence of PW13 in the postmortem report exonerated the appellant the learned Judge held that:

“...There is no way that PW13 could have reached the conclusions she did unless there was either a mix-up in the labeling of the blood samples extracted from the deceased and the accused or there was deliberate interference with the exhibits and the blood samples submitted to the Government Chemist for analysis. For the reasons stated above, I disagree with the findings by PW13. PW13 was an expert witness whose evidence amounted to a mere opinion which is not binding on this court. See *Akute v Republic* (2006) 1KLR 488.”



We agree with this finding of the learned Judge.

33. We also agree with the learned Judge’s decision on the failure of the prosecution to call the investigating officer as a witness. The superior court had this to say:

“..... I must clarify at this point that I am not in any way downplaying the importance of the evidence of investigating officers. Their evidence is important but where the prosecution has tendered strong and credible evidence from other witnesses that is sufficient to establish the guilt of an accused person as charged, the absence of the evidence of an investigating officer in such a case would not adversely affect the prosecution case”.

34. From the foregoing analysis, we are satisfied that the learned trial Judge was not in error in concluding that the appellant, and no one else killed the deceased.

35. We shall now consider whether the appellant had malice aforethought when he committed the offence. In Section 206 of the Penal Code malice aforethought is defined as follows:

“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.”

36. Apart from other injuries occasioned to the deceased, PW1 saw the appellant chop off his head. PW10 who produced the postmortem report testified that the report indicated that the body of the deceased had several injuries to the face and neck and the head was completely severed from the body. We have no doubt in our minds that by severing the deceased’s head from his body, the appellant intended nothing but death for the deceased.

37. Paragraph 28 of the impugned judgement evinces that contrary to the appellant’s assertion, his defence was considered and found not to be plausible. The learned Judge stated thus:

“I have given due consideration to the accused’s statement in defence. I find that when compared to the prosecution’s case, the accused’s defence is without substance and is not worthy of belief. The claim that he was arbitrarily arrested at Kapkangani Trading Centre is clearly false given the prosecution evidence that he in fact surrendered to PW10 and other Administration Police Officers at Kapkangani Police Post as he fled from the wrath of members of the public who had chased him right from the scene of crime.”

We find no basis to fault the reasoning of the Judge on this.



- 38. Ultimately, we agree with the judge that the prosecution proved its case beyond reasonable doubt, hence the conviction is safe.
- 39. We now turn to the sentence. Upon conviction, the appellant was sentenced to life imprisonment. Counsel for the appellant relied on this Court’s decision in Julious Kitsao Manyeso v Republic (2023) KECA to urge that the imposition of a mandatory indeterminate life sentence is an unjustifiable discrimination and unfair violation of human dignity. The respondent on the other hand urged that the learned Judge considered the appellant’s mitigation and also the fact that the teacher lost his life needlessly and in a brutal manner. That life imprisonment was found to be the most befitting sentence. He cited the decision in Bernard Kimani Gacheru v Republic (2002) eKLR which set the principles upon which an appellate court can interfere with the sentence of the trial court.
- 40. The appellate Court does not interfere with sentence on appeal unless the trial Judge has acted upon wrong principles, or overlooked some material factors as stated by the predecessor of the Court of Appeal in the case of Ogolla s/o Owuor v Republic, [1954] EACA 270.
- 41. Indeed, the court is not precluded from imposing even the prescribed mandatory death sentence where appropriate in the circumstances of a particular case. In order to determine whether or not it was appropriate, the court must consider the mitigation offered, if any, as well as the sentencing guidelines and the circumstances of each case.
- 42. In the case before us, we are minded to offer the appellant hope at the possibility of rehabilitation and the prospect of release, hence to give him a determinate sentence of thirty-five (35) years imprisonment in place of life imprisonment.

Accordingly, this appeal is dismissed on conviction and succeeds on sentence, to the extent that the appellant’s sentence of life imprisonment is set aside and substituted therefore with thirty- five (35) years imprisonment. Time spent in custody awaiting trial shall be taken into account when computing the actual duration of the sentence that the appellant will serve, the sentence of thirty five (35) years imprisonment.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

