Odeny v Republic (Criminal Appeal 124 of 2017)
[2023] KECA 42 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 42 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 124 OF 2017

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

FEBRUARY 3, 2023

BETWEEN

ALEX OWUOR ODENY ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Kisumu (D.S. Majanja, J.) dated and delivered on 27th July, 2017 in High Court Criminal Appeal No. 44 of 2012)

JUDGMENT

1. The appellant, Alex Owuor Odeny, was the accused person in the trial before the High Court in Kisumu High Court *Criminal Appeal No. 44 of 2012*. He was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that on June 8, 2012, at Wadanda Village, South West Nyakach location of Nyakach District within Nyanza Province, he murdered Tabitha Akoth Auma ("the deceased").

2. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the Learned Trial Judge convicted the appellant and sentenced him to death in accordance with the law as it then stood.

3. The appellant was aggrieved by that decision and has lodged the present appeal. in his memorandum of appeal, the appellant raised five (5) grounds, which are that:

    1. The trial court erred in both law and in fact in totally misunderstanding and/or failing to appreciate the accused defence and facts of the case thereby coming to a wrong conclusion.

    2. The trial court failed to appreciate the background of the matter.

    3. The Learned Trial Judge erred in both law and fact in failing to appreciate the glaring contradictions in the evidence by the prosecution case.

4. The Learned Trial Judge did not comply with section 169 of the *Criminal Procedure Code* in writing the judgment.

5. The sentence imposed on the appellant is manifestly harsh and excessive in the circumstances.

4. This is a first appeal. Accordingly, the role of this Court is to re- evaluate evidence, assess it, weigh it as a whole and reach our own independent conclusions. In doing so, we required to remember that we neither saw nor heard the witnesses, for which we must make allowance. See *Okeno v. Republic* [1972] EA 32.

5. At the trial court, the prosecution called a total of eight (8) witnesses. The evidence that emerged from the trial was as follows.

6. On 8th June, 2012, Christine Achieng, the deceased's sister who testified as PW1("Achieng") at the trial, was asleep with in her mother's house. The deceased was equally asleep in the same house. Achieng slept on the bed while the deceased slept on the sofa seat. Their mother, Angeline Auma Otieno, who testified as PW2 ("Auma"), was asleep in her bedroom in the same house. At about 5.00 am, Achieng heard the deceased screaming and she awoke and found her lying on the floor, whilst bleeding. Achieng told the court that she saw an assailant stabbing the deceased and that she (Achieng) screamed and the assailant ran away. At the time, the door was open and moonlight was flooding from outside, so Achieng was able to make out some features of the assailant.

7. The assailant ran away upon noticing that Achieng was awake. Achieng gave chase. The assailant turned back, about a meter away, and looked at Achieng and it was then that she recognized him as the deceased's boyfriend – the appellant. Upon recognizing him, Achieng testified that she continued shouting while still chasing the appellant saying,

> " I have seen you Alex".

Alex is the first name of the appellant.

8. Achieng stated that she had known the appellant for about a year prior to the incident and was, thus, sure of his identity. She went back to the house and tried to talk to the deceased but the deceased did not respond. Achieng continued screaming as her mother came from her bedroom and lit a lamp.

9. Auma testified that she knew the appellant and that she used to see him in the village, as his mother lived nearby. She stated that on the material day, she was woken up by Achieng's screams at 5:00 am. She said that she heard Achieng shouting repeated:

> " I have seen you Alex".

10. Auma testified that she came from her bedroom and went over to ask the deceased what was happening. At that point, the deceased had moved from the seat to the bed and was having difficulty breathing. The deceased's only response to Auma was to repeatedly ask "why....why...". She then went silent and into unconsciousness. Auma also started screaming when she noticed that the deceased was non-responsive. She lit a lamp and observed the deceased body. She saw that she had been stabbed on the chest and hands. During cross examination, she conceded that the statement she recorded with the police indicated that she heard PW1 scream at 4.00 am.

11. The third witness to testify, George Otieno Ouma, the deceased's brother ("Ouma"), also told the court that he had known the appellant for about three months prior to the incident; and that the appellant was from the neighbourhood and was also in a romantic relationship with the deceased. He stated

that he was woken up by one his nephews who told him the deceased had been stabbed. He rushed to Auma's house and found that the deceased was still breathing, albeit with difficulty. He saw that the deceased was injured and had a lot of blood on her chest. He was informed at the scene by Achieng that the appellant was the one who had stabbed the deceased. However, he was categorical that he did not witness the incident nor did he see the weapon that was used, save that he only saw the metal rod that the Appellant used to break the door with. During cross examination, he testified that the statement he recorded with the police indicated that he was woken up at 4.30 am and reached the Auma's house at 5.00 am as it was quite a distance from his house. He then went and reported the matter to the Police at 5.30 am.

12. James Obuya Osoro, the deceased's father, was called on the material day while he was at Sondu, and informed that his daughter (the deceased) had been killed. He identified her body before the post mortem was done on 14/06/2012. He testified as PW4.

13. PW5, Senior Sergeant Joseph Ojune Ekasiba, was the police in- charge at Ongoro Patrol base, Upper Nyakach, at the time. In his testimony, he said that on the material day, he received a call at about 5.45 am from Ouma, informing him that the deceased had been stabbed by "an unknown person." Sergeant Ekasiba told Ouma to rush the deceased to hospital but Ouma informed him that she was in a bad condition. Sergeant Ekasiba hurried to the scene arriving at about 6.00 am in the company of two other Police Officers. On entering the house, they found many other people including the deceased, PW1, PW2 and PW3. They found the deceased lying on the sofa and she had stab wounds on both upper limbs and on the chest. Sergeant Ekasiba sent for a vehicle to collect the body of the deceased and take it to the mortuary. He inquired about what had happened from the family and Achieng informed him that as they were sleeping, the appellant entered the house, stabbed the deceased and left. They called the appellant's sister and asked her the whereabouts of the appellant but they did not trace him. He was later arrested in Kisumu after his name was circulated.

14. PW6, Dr. Eve Koile, testified on behalf of Dr. Farida who conducted the postmortem on the deceased. Dr. Farida observed that the deceased had multiple cut wounds all over her body as follows; a 5 cm deep cut wound on the 3rd intercostal area, cut wounds on the right upper limb on the lateral side of the arm and on the right elbow joint, a deep cut wound on the left upper arm on the lateral side measuring about 4 cm and a deep cut wound on the right chest measuring about 8 cm. Internal examination revealed a cut wound on the left upper lobe of the lung which resulted in internal bleeding. She concluded that the cause of the deceased death was cardiovascular arrest secondary to internal bleeding resulting from assault with a sharp object penetrating the lungs.

15. PW7, Senior Sergeant Peter Nyabondo, arrested the appellant on 14/06/2012, after a tip off from a member of public who had spotted him in Nyamasaria, Kisumu.

16. PW8, Corporal John Odari, took over the investigation of the case from Sergeant Ekasiba. He testified that from his investigations, he concluded that the root cause of the matter was a relationship issue/love triangle. He, however, testified that there was no bad blood between the appellant and the deceased's family. He stated that no murder weapon was found at the scene.

17. When he was placed on his defence, the appellant testified that the deceased was her wife and they had even lived together. On the material day, he said that he received a call from Ouma who informed him that the deceased had been stabbed by an unknown person. The appellant, testified that Ouma asked him to go home as her boyfriend, but he could not go since he had some business to attend to and also because he had no transport. The appellant also claimed that PW4 (Osoro, the deceased's father) called him to inquire about the death of the deceased and asked him to go and take her body if he wanted to but only on condition that he pays dowry and Kshs. 10,000/= to Auma, the deceased's mother.

18. The appellant claimed that Osoro told him that if he did not pay the demanded amounts quickly, he (Osoro) would write a statement against him (Appellant) to the Police. The appellant testified that at the time of the deceased's death, he was living with his aunt whilst looking for a job in Kisumu. However, he also stated that he had been with the deceased on the Saturday, before the incident. He was thereafter arrested on 14/06/2012 for the murder of the deceased. He said that he was framed because he could not pay dowry.

19. The appellant called one witness, his aunt, who testified as DW2. She testified that the appellant had lived with her from May, 2012 whilst he was working in Kisumu. She said that on the material day, the Appellant was at her house and he went to bed at 9.00 pm and woke up at 6.00 am.

20. The appeal was argued by way of written submissions by both parties. During the virtual hearing, Learned Counsel, Mr. Oguso, appeared for the Appellant, whereas Learned Counsel, Mr. Okango, appeared for the Respondent. Both parties relied on their submissions.

21. Counsel for the appellant contended that there were glaring contradictions in the prosecution case. He argued that the testimonies of PW1, PW2, PW3 and PW5 did not corroborate each other with regard to who killed the deceased. Counsel stated that PW1 (Achieng) claimed that she was woken up by the deceased screams at 5.00 am and that she saw the person who killed her (deceased) as he run away; she (PW1) too ran out screaming and knew it was the deceased boyfriend (appellant). PW1 further claimed that she saw the Appellant stabbing the deceased as it was daybreak and there was light from outside. However, during cross examination, Mr. Oguso argued, PW1 stated that she woke up and saw a person, who she followed outside and realized it was the appellant. This chronology of events, Counsel argued, was not plausible. In addition, Counsel contended that the prosecution did not demonstrate malice aforethought before the commission of the offence, as required by law.

22. Counsel rejected PW1's testimony that the Appellant stabbed the deceased. According to him, if that were so, then PW1 would have told the deceased's mother immediately that it was the Appellant who stabbed her when the mother went to into the room and called her before she died. He submitted that Auma was categorical that when she called the deceased, she did not respond and it was at that point that she lit a lamp to observe her body. Counsel further submitted that the lamp was lit after the assailant had taken off and Achieng did not inform Auma that she had spotted the appellant running away from the scene. Counsel also wondered if the room was dark enough for Auma to light a lamp, how then was it possible for PW1 to identify the appellant as the person who stabbed the deceased? Counsel disputed the testimony of PW1 that she was able to recognize the Appellant from the moonlight that shone, as she did not state the intensity of light of the moon.

23. Counsel submitted that Ouma, who arrived barely thirty (30) minutes after the incident, was categorical that there was very little light and he could see very little; and so it would have been impossible for Auma to see a person running away, given that she did not give a description of what the appellant wore. In this regard, counsel submitted that the conclusion drawn by the Learned Trial Judge that there was sufficient moonlight on that early morning, was erroneous and misleading as Auma did not give any evidence of sufficient light having been present; and that rather, she only spoke of moonlight.

24. Counsel also sought to rely on the testimony of Sergeant Ekasiba who stated that he received a call from Ouma who informed him that his sister (the deceased), had been stabbed by "an unknown person." According to counsel, this proved that Ouma did not know who stabbed the deceased; yet, counsel faulted Ouma for testifying at trial that Achieng had told him at the scene that it was the appellant who had stabbed the deceased. This, counsel pointed out, was completely at variance with Ouma's first report to the Police. Counsel submitted that the only conclusion that could be drawn from this was

that the appellant was, at most, a suspect and no concrete evidence was placed before the court to tie him to the murder. To buttress this assertion, counsel relied on the case of *Sawe v. Republic* [2003] eKLR where the court held that suspicion, however, strong is not enough to sustain a conviction. Counsel further submitted that the trial court made a good observation and warned itself in terms of the findings in *Republic v. Turnbull* [1967] 3 ALL ER 549 and *Anjononi & 2 Others v. Republic* [1980] KLR 59 but still came to a wrong conclusion as the evidence of Achieng as read with the evidence of Auma, Ouma, and Sergeant Ekasiba raised serious doubts as to the identity of the assailant in this case.

25. The appellant's counsel also complained that the Police in the case botched the investigations and weakened the prosecution case because they did not secure the scene or crime and the rod which was allegedly used to break open the door. The rod, counsel argued, could have provided DNA clues about the assailant – yet it was not examined to either place or eliminate the appellant at/from the scene of crime.

26. Lastly, counsel stated that the Learned Trial Judge failed to consider the appellant's defence and the facts of the case, and thereby came to a wrong conclusion. Counsel contended that in spite the fact that the appellant was at his aunt's place on the material day and his defence *alibi* was not challenged, he was found guilty of the offence of murder. He submitted that Ouma called and informed the appellant of the deceased's death and requested him to go home, but the appellant could not travel as he was jobless and did not have money. Counsel complained that the court failed to properly consider the *alibi*.

27. Opposing the appeal, Mr. Okango, submitted that the appellant attacked the deceased as she slept in her parents' house and stabbed her several times due to a love affair gone sour. He disputed the Appellant's assertion that the prosecution case failed to meet the required threshold and submitted that Achieng managed to see the deceased assailant as she followed him outside and recognized him as the deceased's boyfriend (appellant) through the moonlight that was shining. Counsel argued that although the incident took place at 5.00 am, Achieng testified that she was able to identify the appellant. Further, she had known the appellant very well for about one year, prior to the incident as he was the deceased's boyfriend, and that therefore, identified him through recognition when the appellant turned back and looked at her (PW1) as he ran. Mr. Okango submitted that as such there was no possibility of mistaken identity. In this regard, Counsel cited the case of *Anjononi & Others v. Republic* [1980] eKLR wherein the court held that evidence of recognition 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.

28. Counsel disputed the existence of any contradictions, and argued that the position in law is that their existence does not per se vitiate the prosecution case. He contended that the contradictions, if any, were minor and did not affect the evidence tendered. In this regard, he relied on the cases of *Njuki & 4 Others v. Republic* [2002] 1KLR 771 and *Peter Ngure Mwangi v. Republic* [2014] eKLR.

29. Counsel rejected the Appellant's *alibi* and argued that the trial court analyzed and weighed it against the totality of the prosecution evidence and found that the latter, especially the evidence tendered through eye witness as truthful and credible, unlike the former which was ousted. He submitted that the learned trial judge considered the defense of the appellant but the same did not in any way cast any doubt against the weighty evidence adduced by the prosecution.

30. As regards the content of the judgment, Counsel submitted that the same was proper and complied with the requirements under section 169 of the *Criminal Procedure Code*.

31. As regards the sentence imposed on the Appellant, state counsel was not opposed to a review of the same. He, however, submitted that the imposition of death penalty was just and proper in the

circumstances of the instant case as mitigation was held and the trial court considered the appellant's mitigation before passing the sentence.

32. We have carefully evaluated the evidence before the trial court. We have also considered the appeal before us, the rival submissions of the parties and the authorities cited in support of the opposing positions.

33. This appeal, as framed and argued, raises five questions for determination:

    a. First, whether the judgment complied with section 169 of the *Criminal Procedure Code* and if not what the implications for such non-compliance would be.

    b. Second, whether the identification evidence presented was sufficient to support a conviction.

    c. Third, whether there were material contradictions in the prosecution case to make the conviction unsafe.

    d. Fourth, whether the learned trial judge erred in dismissing the *alibi* defence mounted by the appellant.

    e. Fifth, whether the sentence imposed was legal and justified in the circumstances.

34. We begin with the first complaint because it is formal in nature. The complaint is that the judgment delivered by the learned judge in this case does not comply with the essentials of section 169(1) of the *Criminal Procedure Code* – and that that failure, without more, should entitle the appellant to a reversal of the conviction and sentence. Section 169(1) states as follows:

> " Every such judgment shall, except as otherwise expressly provided by this *Code*, 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.
>
> 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.
>
> In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."

35. We have looked at the judgment delivered by the learned judge in this case. It summarizes the evidence adduced in the case. It then lays down the points for determination and arrives at decisions on those point in a reasoned manner. It is also dated and signed. We do not see any basis for faulting the judgment on its formal qualities. It is, perhaps, shorter than most judgments coming out of superior courts – but there is no legal or juridical requirement for rendering relentlessly long-winded and interminable judgments which go into pettifogging details where a pithy one would do. Section 169(1) of the *Criminal Procedure Code* does not prescribe dilatoriness; it calls for a reasoned pronouncement by a judicial officer on disputed legal or factual questions presented before the judicial officer. The judgment in question here easily meets this threshold, and it does so with admirable brevity.

36. The lead substantive grievance by the appellant is that there was insufficient evidence of identification; and that, therefore, the conviction was unsafe. We have set out above the evidence as it emerged at the trial. In short, Achieng, the deceased's sister, testified that she was awaken by her sister's screams. She was sleeping in the same room as the deceased – she on the bed; the deceased on the couch. Upon

waking up, she said, she saw the door open and a man repeatedly stabbing her sister. She raised alarm and the man took flight. She gave chase. The man, she said, was barely one metre away from her. Then, the man turned to look at her even as he fled. He immediately recognized the man as her sister's estranged boyfriend, the appellant. On this recognition, Achieng immediately shouted,

> " I have seen you Alex!".

Thereafter, having given up on apprehending the appellant on her own, she returned to the house to attend to her wounded sister.

37. Before us, the appellant's counsel argues that the lighting was not sufficient for a positive identification. He argues that while the learned trial judge laid down properly the test and factors to consider in evaluating identification evidence, the judge misapplied the test to the case at hand.

38. It is true that this court has consistently held that the evidence of identification/recognition at night must be tested with the greatest care using the guidelines enunciated in *Republic v Turnbull*, (1976) 3 ALL ER 549 and that such evidence must be watertight to justify conviction. (See, for example, *Nzaro v Republic*, 1991 KAR 212 and *Kiarie v Republic*, 1984 KLR 739). In *Maitanyi v Republic* 1986 KLR 198, this Court stated that in determining the quality of identification using light at night, it is at least essential to ascertain the nature of the light available, what sort of light, its size and its position relative to the suspect.

39. Analyzing the evidence on record in the present case, it is painfully clear that the learned judge made a conscious inquiry about the nature of the light and its brightness (the fact that it was dawn and there was bright moonlight). The judge also advertently considered that the identifying witness was no more than a metre away from the appellant when the appellant turned to face her as he fled on foot. Additionally, it must be noted that this was evidence of identification by recognition: the witness testified that the appellant had been in a relationship with the deceased for more than a year and she had known him for that period. Consequently, we are persuaded that in this case, there was proper testing of the evidence of identification and recognition by the trial court; and that it was free from error.

40. A related grievance by the appellant is that there were material contradictions in the prosecution evidence which, he argues, should have been resolved in his favour. The contradiction the appellant points to is the evidence of Ouma (who testified as PW3); the evidence of Sergeant Ekasiba (who testified as PW5) and the evidence of Achieng (who testified as PW1). The appellant argues that it is curious that when Ouma called Sergeant Ekasiba in that fateful morning, he told him that the deceased had been stabbed by "an unknown man" yet Ouma testified that as soon as he got to the house Achieng told him that it was the appellant who had stabbed the deceased. Additionally, the appellant also points out that Achieng (PW1) claimed that the incident happened at 5:00am while Auma (PW2) claimed that it happened at 4:00am.

41. We have considered this ground. We do not think that the alleged contradictions are material. The test that the court utilizes on the effects of contradictions or inconsistencies on the prosecution case is a substantive one: it inquires whether the contradictions or inconsistencies in the prosecution evidence are to such an extent that a reasonable person would be left in doubt as to whether the charges were proved, or whether the contradictions (if any), are so material that the trial court ought to have rejected the evidence. Differently put, not every inconsistency however infinitesimal introduces reasonable doubt to the Prosecution case. This court stated the test in *Erick Onyango Ondeng' v Republic* [2014] eKLR Criminal Appeal No. 5 of 2013 in the following words:

> With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not

necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

42. In the present case, there was direct evidence by Achieng that she saw the appellant stabbing the deceased. She also testified that she told Ouma the name of the assailant as soon as Ouma arrived at the house. Ouma corroborated this part of the evidence in his own testimony. The two witnesses were consistent. The evidence of Sergeant Ekasiba reporting that Ouma had told him that it was "an unknown person" can be explained, in view of the corroborative and strong testimonies of Achieng and Ouma, in terms other than the incredulity of the prosecution narrative. It is particularly telling that Achieng was a testifying eye witness – and the defence did not cross-examine her at all about her narrative. In any event, the inconsistency does not point to a deliberate untruthfulness or affect the main substance of the prosecution case. The same fate befalls the minor inconsistency about time: victims of crime cannot be expected to have strikingly similar recollections about the exact time the crimes happened.

43. Next, we deal with the question whether it was correct for the learned judge to dismiss the *alibi* defence by the appellant. We begin by noting that during the trial, the appellant did not at all contest that he lived in the same village as the deceased. This evidence was given by PW1, PW2 and PW3 while PW5 also indicated that he was informed that the appellant lived within the village. That portion of the evidence by the three witnesses was not challenged on cross-examination at all.

44. However, during the defence hearing, the appellant claimed that he was living at DW2's place at the time of the incident. He did not expressly state whether he lived in the neighbourhood of the deceased. However, it was his testimony that he was with the deceased the Saturday before the incident. He did not state where they met. To buttress the *alibi* defence, DW2 stated that the appellant was at her place in Nyamasaria, Kisumu. She claimed that the appellant went to sleep at 9.00 pm and woke up at 6.00am. This sparse testimony which was quite parsimonious with the details hardly inspired the confidence of a fact finder that it was, on balance, true or displaced the prosecution theory. First, even if taken at face value, the supporting evidence given by DW2 does not fully rule out the appellant as the perpetrator of the crime. This is because there was no demonstration that the appellant could not possibly have traveled from the scene of the crime to the home of DW2 that same morning.

45. Second, the evidence of DW2 was not credible as *alibi* evidence because it tended to contradict the narration of the appellant. The appellant claimed that when he received news that this "wife" had been stabbed he could not immediately travel because he had "business" to deal with on that day. The deduction is that he was up and about. Yet, his *alibi* witness, DW2, stated that the appellant was at home the whole day.

46. All in all, we are satisfied that it was proper for the learned trial judge to dismiss the *alibi* defence as so improbable that it cannot reasonably possibly be true. (See *S v Shackell* (4) SA 1 (SCA)). In our view, it is not possible to say that the appellant's version of events has any reasonable inherent probability that it is true. Or, as to paraphrase the US Supreme Court in *Holland v. United States*, 348 U.S., at 140, 75 S.Ct. at 137, the appellant's *alibi* defence did not raise any "reasonable doubt" of the kind which would cause a reasonable person to hesitate to act.

47. We reach this position respectful of the proposition that the onus of disproving an *alibi* defence ordinarily lies with the prosecution but also aware that where, like here, the *alibi* is raised for the first time at defence hearing the test is different. When an *alibi* is raised this late, the investigator does not have the opportunity of testing it through investigation while the prosecution, which will not have anticipated the defence, will not have set up its case with the *alibi* in mind. It is for this reason that that

the manner of treating a belated *alibi* is to weigh it against the strength of the prosecution case. See *Karanja v Republic* [1983] KLR 501 and *Victor Mwendwa Mulinge v Republic* [2014] eKLR This is the approach the trial court took and so have we in re-evaluating the evidence.

48. We must also point out that the appellant's post-incident conduct is also inconsistent with the possibility that his version of events had any reasonable inherent probability that it was true: the appellant admitted that the deceased was his wife. However, while he conceded that he was informed about the stabbing the same day it happened, he did not make any attempt to go to the home of the deceased until he was arrested more than a week later. His explanation that he did not have fare to travel is simply not believable especially when seen against his own contradictory statement that he did not go the first day after receiving a call from the deceased's brother because he had "other business."

49. Finally, we turn to the appeal against sentence. The appellant argues that the sentence imposed was harsh and excessive and that we should utilize the emerging jurisprudence spawned by the Supreme Court decision in *Francis Karioko Muruatetu v Republic & 6 Others* [2017] eKLR to reduce it.

50. Mr. Okango, the state counsel, did not oppose the review of the sentence although he pointed out that the death penalty is still legal in Kenya even after the Supreme Court decision in the *Francis Karioko Muruatetu Case*.

51. The learned judge in this case imposed the death penalty before the law changed. At the time the judge sentenced the appellant, death penalty was considered mandatory upon conviction for murder. Indeed, after hearing the mitigation of the appellant, the learned judge pointed out that his hands were "tied."

52. Fortunately for the appellant, the *Francis Karioko Muruatetu Case* "untied" our hands, if they ever were. Ultimately, as this court has variously pointed out in the post-Muruatetu period, the fundamental and immutable principle of sentencing is that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed and the circumstances of the crime committed. In the case of murder, the death sentence should be reserved for the highest-level of the offence – one committed most heinously, and often with a depraved and sadistic infliction of harm.

53. The homicide committed by the appellant here, while serious and definitely calls for a stiff custodial sentence to reflect the objective seriousness of the offence, it does not represent the highest-level murder offence to attract the death penalty.

54. We have taken in to account the mitigation that was given by the appellant. He told the court that he was young (he was 31 years old at the time); that he was an orphan; that he had two children with the deceased; and that he was remorseful. These mitigating factors must be balanced with the aggravating factors present in this case: that the appellant's action is a reflection of toxic masculinity often present in gender-based violence that happens between intimate partners; that he criminally broke and entered into the house in order to commit the murder; and that he stabbed the deceased several times. Taking all these factors into consideration, we are persuaded that a sentence of imprisonment for twenty (20) years would be appropriate in this case.

55. In the result, the appeal against conviction is hereby dismissed. However, the appeal against sentence is allowed. The sentence of death is set aside. We substitute it with a sentence of twenty (20) years imprisonment. In computing the sentence, by dint of section 333(2) of the *Criminal Procedure Code*, the period between 18th June, 2012 (when the appellant was arraigned in court) and 11th July, 2016 (when he was released on bond) shall be computed as part of the appellant's prison sentence.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF FEBRUARY, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR