Hirbo v Republic (Criminal Appeal 27 of 2021)
[2023] KECA 249 (KLR) (3 March 2023) (Judgment)

Neutral citation: [2023] KECA 249 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 27 OF 2021

MSA MAKHANDIA, GWN MACHARIA & WK KORIR, JJA

MARCH 3, 2023

BETWEEN

MOHAMED ADEN HIRBO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nairobi (Hon. F.N. Muchemi, J.) delivered on 14th March, 2013 in HC Criminal Case No. 33 of 2007)

JUDGMENT

1. The appellant, Mohamed Aden Hirbo, was convicted by the High Court for the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. It was alleged that on 6th March, 2007 at Kiamaiko Market within Nairobi County he murdered one Mohamed Jillo Ote. The appellant was upon conviction sentenced to suffer death.

2. The appellant has approached this Court as the first appellate court seeking to overturn both the conviction and sentence on the grounds that his conviction was based on evidence that did not favour positive identification; that the prosecution failed to prove the case against him to the required standards; that his rights under Article 49(1)(f) of *the Constitution* were infringed during trial; that the learned Judge failed to consider his defence hence violating the provisions of Section 169(1) & (2) of the *Criminal Procedure Code*; and, that the trial court failed to consider the fact that he was arrested after he presented himself to the police. The appellant raised another ground of appeal in his written submissions which was reiterated orally by his counsel to the effect that the learned Judge failed to consider the defence of insanity. The appellant's prayer to this Court is that his appeal be allowed and the conviction and sentence of the trial court be quashed and set aside.

3. This being a first appeal, our mandate is provided under Rule 31(1)(a) of the Court of Appeal Rules, 2022. We are required to conduct an independent re-appraisal and analysis of the evidence on record

and reach our own finding on the guilt or otherwise of the appellant. The boundaries within which we are to exercise this mandate were expounded by this Court in *Dickson Mwangi Munene & another vs. Republic* [2014] eKLR as follows:

> "This being a first appeal, this Court is obliged to re-evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge's finding of fact unless it is not supported by the evidence on record."

4. To make up its case against the appellant, the prosecution called eight witnesses. PW1 Stephen Matinde, a Government Chemist received from the investigator a black sweater, blood samples of the deceased, a panga and blood samples of the appellant. He was required to ascertain whether the sweater and the panga were stained with blood and the blood groups. Upon carrying out the analysis, he established that the panga and the sweater were stained with human blood of group A. He also established that the deceased's blood group was A while that of the appellant was group

   O. He concluded that the blood on the sweater may have come from the deceased.

5. Abdikadir Abdullahi (PW2) testified that on the material day, he saw the deceased entering Saku slaughter house in Kiamaiko followed closely by the appellant. He then saw the appellant looking for a panga and when he could not get one inside the slaughter house, he went outside. Once outside, the appellant tried grabbing one belonging to a female vendor but when she resisted the appellant ran back to the slaughter house and took a panga from one Alio. The appellant then cut the deceased on the head and three times on the neck even after he had fallen down. The witness further testified that the incident occurred while he was about 5 meters away and he could positively identify the appellant. The appellant then took off from the scene with the panga in his hand. PW2 chased him for about 200 metres. In the process the appellant met a police van on patrol. The appellant was arrested by the police officers in the vehicle and escorted to the Huruma Police Post. The body of the deceased was taken to the Police Post by the elders.

6. Dr Peter Ndegwa (PW3) conducted postmortem on the body of the deceased. His findings were that externally, the deceased had 3 deep cut wounds on the nape of the neck, deep cut on the left temporal-occipital scalp and a severed spinal cord. He formed the opinion that the deceased died of severe head injury due to sharp trauma.

7. The evidence of Hage Daudi who testified as PW4 was that on 6th March, 2007 at around 7.00am, she had gone to Saku slaughter house to collect a key from her husband when she saw people running out of the slaughter house. Out of curiosity, she went in to find out what was happening. Once inside she saw the appellant cutting the deceased using a panga. She then screamed and at that moment, the appellant advanced towards her direction wielding the panga forcing her to evade him. Once the appellant went past her, she went back and found the deceased had died.

8. Kasim Yate (PW5) stated that at about 7.00am on the material day, the deceased approached him at the slaughter house seeking to purchase some tripe. When they could not agree on the price, the deceased moved to the next vendor. It is while the deceased was at the next stand that he saw the appellant cut him with a panga on the neck. He further testified that the deceased and the appellant did not have any conversation before the incident happened.

9. Dr Zephania Kamau (PW6) examined the appellant and recommended that he be taken for psychiatric assessment.

10. PC Joseph Kaunda (PW7) testified that on the material day, he escorted the deceased's body to the City Mortuary and witnessed the post-mortem. He was handed a bloodstained panga and a sweater stained with blood from the appellant who was in police custody at the time. At the mortuary, he requested for a blood sample of the deceased which alongside the panga and the sweater, he sent to the Government Chemist for analysis. He also obtained the appellant's blood samples and forwarded to the Government Chemist. He produced the sweater and the panga as exhibits.

11. PW8 Chief Inspector Henry Mbogo attested that on 6th March, 2007 he received the appellant from police officers from Muthaiga Police Station who were on patrol. The officers informed him that the appellant, who had a blood-stained sweater, had been accused of murdering someone and that he was on the brink of being lynched by a mob. Thereafter, members of the public came into the Police Post with the deceased's body alleging that he had been murdered by the appellant. The public also handed over to him a panga. He then instructed PW7 to escort the body for post-mortem. He later learned that the appellant was married to the deceased's sister and that they had since separated.

12. Upon finding that the prosecution had established a prima facie case, the trial court placed the appellant on his defence. He elected to give unsworn testimony and did not call any witness. His testimony was that he was in the business of buying and selling meat at Kiamaiko slaughter house while also doubling up as a causal worker, slaughtering goats for customers. That the deceased was his brother-in-law. With regard to the events of 6th March, 2007, the appellant stated that he had slaughtered 3 goats when the deceased approached him to purchase some meat. After giving the deceased his price list, the deceased accused him of slaughtering dogs. The deceased then held him by the collar and asked him which human beings ate dogs after which the deceased hit him on the head knocking him down.

13. It was the appellant's evidence that while he was kneeling down apologizing to the deceased, the deceased stepped out and came back wielding a knife. It is at this moment that he picked the panga that he had used for slaughtering goats from the ground and used it to defend himself. He stated that the deceased then cut him on the nose and leg with the knife and he responded by cutting the deceased twice on the head with the panga. When he realized that the deceased had suffered injuries and the crowd became hostile, he took off, and, on the way, met four police officers who rescued him from the wrath of the angry mob. He was then taken to Huruma Police Post and transferred to Muthaiga Police Station the following day. He insisted that it was the deceased who came to his place of work and assaulted him.

14. Parties filed their respective written submissions in this appeal which they urged the Court to take into consideration. Ms Khamala, counsel for the appellant submitted that even though the issue of the appellant's soundness of mind and mental capacity at the time of the commission of the offence was not canvassed at the trial, this Court ought to consider it. Counsel reiterated the grounds of appeal as raised in the memorandum of appeal but majored her submissions on the issue of the appellant's alleged insanity. Counsel held the view that the prosecution failed to prove the aspect of mens rea hence in the circumstances, the actions of the appellant could be qualified as random acts of a person labouring under schizophrenia.

15. Counsel further submitted that the actions of the appellant were not carried out in secrecy nor planned. Further, that the appellant exhibited a forceful and continuous urge to inflict pain which, according to counsel, was supported by the results of the appellant's psychiatric examination which confirmed he needed medical attention. He also submitted that the fact that the appellant was only declared fit to stand trial one year after his arraignment in court is a true reflection that he suffered from unsound mind. He urged the Court to rely on the case of *Marli vs. Republic* [1985] eKLR for the proposition that the burden of proving insanity by the appellant is low and could be discharged by proving on

a balance of probabilities that it seemed more likely that due to mental disease, the appellant did not know what he was doing at the material time or that by reason of illness, the appellant did not appreciate the full consequences of his acts.

16. Counsel also submitted that the prolonged length of the trial led to the appellant being denied his right to a fair hearing as provided for under Article 50 of *the Constitution*.

17. On his part, Mr Omondi for the respondent, submitted that the evidence adduced by the prosecution sufficiently proved all the elements of the offence with which the appellant was charged. With regard to the identity of the appellant, counsel referred the Court to the evidence of PW2, PW4 and PW5 and stated that this was a case of recognition as opposed to identification of a stranger.

18. On malice aforethought, it was the submission of counsel that the evidence adduced proved the ingredients set out in Section 206(a), (b) and (c) of the Penal Code. Counsel therefore urged this Court to dismiss the appeal and uphold the findings and sentence of the trial court.

19. Upon our independent review of the evidence on record, the record of appeal and the submissions by the rival parties, we find no fault in the issues the trial court framed for determination. It is therefore our view that in determining this appeal, we will address issues similar to those identified by the trial court, namely, the fact as to the death of the deceased and its cause, the identity of the appellant as the person who committed the offence, and finally, whether the appellant had the required malice aforethought in committing the offence.

20. The death of the deceased was not in dispute in this case. We find the evidence of PW3 critical in concluding that the deceased died and the cause of his death. PW3 conducted post-mortem on the body of the deceased and reached the conclusion that it was the severe head injury due to sharp trauma which led to the death of the deceased.

21. The next issue is whether it is the appellant who caused the death of the deceased. Both the deceased and the appellant were inhabitants and common persons within Kiamaiko market. The incident in question took place at about at around 7.00am going by the evidence of PW4 and PW5. The venue was inside Saku slaughter house in Kiamaiko. There were at least three eyewitnesses who testified that they witnessed the crime. PW2, PW4 and PW5 all testified seeing the appellant commit the offence. Each witness testified to have known the appellant for a period of time prior to the incident. PW4 also testified as to the existence of light from an electric bulb that illuminated the slaughter house. In our view, the evidence of PW2, PW4 and PW5 is that of recognition. On this kind of identification, this Court, in *Reuben Taabu Anjononi & 2 others vs. Republic* [1980] eKLR stated as

follows:

> "...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."

22. The question that would then follow is whether the conditions were favourable to allow a positive recognition of the appellant by the witnesses. PW2 gave evidence as to how he saw the appellant walking from the deceased's hotel. The witness walked all the way to the slaughter house behind the appellant who was closely following the deceased. PW5 witnessed the incident within a distance of 3 meters, while PW4 came right at the moment of the incident. PW2 and PW4 testified how they saw what transpired aided by light emanating from the electric bulbs that were on at the time. In our view, we have no doubt that the prevailing circumstances were favourable to enable the witnesses to register the appellant.

23. Interestingly, the appellant also placed himself at the scene of crime and conceded to being the one who assaulted the deceased. The appellant in his defence did not deny being the one who assaulted the deceased in the slaughter house. In fact, he went ahead to give an account of how he hit the deceased after which he left running away from an irate mob that was after him. In the circumstances, we find that the identification of the appellant as the person who caused the death of the deceased was proved beyond reasonable doubt. The appellant's claim that he was not clearly identified as the perpetrator of the crime is therefore wanting and we reject this argument.

24. The next issue for our determination is whether the appellant had the requisite malice aforethought when he committed the actions that led to the death of the deceased. The learned trial Judge in her judgment noted that even though the motive was not known, the actions of the appellant could be construed that he had only one intention, to end the deceased's life. A review of the evidence on record shows that the Judge cannot be faulted for reaching this conclusion. As has been held in several decisions, malice aforethought can be construed from the circumstances leading to death of the deceased. In *Paul Muigai Ndungi vs. Republic* [2011] eKLR, this Court held that:

> "More particularly, malice aforethought is deemed established by the evidence proving an intention to cause death of or to do grievous harm to any person."

25. Similarly, in the earlier case of *Morris Aluoch v Republic* [1997] eKLR, this Court held that:

> "If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until after the death of the deceased some four days later. In the case of *Rex vs Tubere s/o Ochen*(supra) the assault was of a serious nature causing severe injuries from which the victim died shortly afterwards."

26. In this case, evidence was led to show that the appellant assaulted the deceased more than once with a panga. There is also evidence that the appellant had followed the deceased closely from his restaurant to the slaughter house. The appellant was adamant in getting his hands on a panga to an extent that when he failed to get an idle panga, it took him two attempts at snatching a panga before he got one from someone inside the slaughter house. Just like the trial court, we have no trouble reaching the conclusion that the actions of the appellant had only one motive that is to end the life of the deceased. His repeated actions of cutting the deceased and the nature of injuries inflicted on the deceased are a testament to his malicious intentions.

27. During the trial, the appellant offered the defence of provocation.

    His unsworn evidence on what transpired was ousted by the clear narration of the events by the eyewitnesses. It is apparent that the deceased was caught off guard as he was going about his business rendering him incapable of defending himself, leave alone provoking the appellant. We can therefore do no more but agree with the trial court that the defence was an attempt by the appellant to distort the chain of evidence to his own advantage. We too, find no trouble in dismissing the defence of provocation.

28. The next issue is whether the defence of insanity was available to the appellant. In this appeal, the appellant's counsel has strongly pursued the argument that the defence of insanity was available to the appellant. In fact, counsel submitted that the trial court failed to consider that this was a defence available to the appellant. We are obliged to consider this line of argument in view of the fact that one of the appellant's grounds of appeal is that the case against him was not proved beyond reasonable doubt.

In an information of murder, the prosecution is required to prove malice aforethought and where an accused has no control of his mental faculties it cannot be said that he or she had malice aforethought.

29. In support of his claim that he was of unsound mind at the time of the assault on the deceased, the appellant relied on the evidence of PW6 who testified that upon examining the appellant on 30th March, 2007, he recommended that he be taken to a psychiatrist for mental assessment. From the record, it is apparent that the case against the appellant was delayed for quite a period of time since he was found to be unfit to stand trial. The appellant spent months at the Mathare Mental Hospital prior to being declared fit to take plea and stand trial.

30. In considering whether an accused person has established the defence of insanity, sections 9, 10, 11, and 12 of the Penal Code must be taken into consideration. Section 9 provides for the need to establish the intention and motive as follows:

    9 (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

    2. Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

    3. Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility."

31. Section 10 proceeds to state that:

    " 10. Mistake of fact

    1. A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

    2. The operation of this section may be excluded by the express or implied provisions of the law relating to the subject."

32. Section 11 provides for the doctrine of presumption of sanity as follows:

    " Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."

33. Ultimately, Section 12 legislates on the defence of insanity in the following terms:

    " A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission."

34. The import of Section 11 of the Penal Code is that every person is presumed sane and responsible for his or her actions at all times including when he or she is alleged to have committed an offence. However, even though Section 11 recognizes sanity as the normal or usual condition of human beings, the criminal law realm recognizes that sometimes the human mind is afflicted by disease that renders a person incapable of understanding his or her actions. The presumption that all human beings are normal is therefore rebuttable hence the defence of insanity. This is the import of Section 12 of the Penal Code. Section 12 of the Penal Code must, however, be read in unison with Section 9(1) of the Penal Code so as to achieve the proper appreciation of the defence of insanity. It therefore follows, and as has been held by this Court, that for the defence of insanity to stand, it must be proved that at the time of the commission of the offence charged, the accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act he is charged with or was incapable of knowing that it was wrong or contrary to law. This Court in *Leonard Mwangemi Munyasia vs. Republic* [2015] eKLR addressed the defence of insanity as follows:

> " Under the rule insanity is a defence if at the time of the commission of the act, the accused person was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. In such circumstances, the accused person will not be entitled to an acquittal but under section 167 (1) (b) of the Criminal Procedure Code he would be convicted and ordered to be detained during the President's pleasure because insanity is an illness (mental illness) requiring treatment rather than punishment. Such people when so detained are considered patients and not prisoners.
>
> ... The test is strictly on the time when the offence was committed and no other."

35. Having laid the basis for the applicability of the defence of insanity, we also must reiterate that there can be certain difficulties in assessing a person's state of mind at the time of committing the offence. As was noted by this Court in the case of Leonard Mwangemi Munyasia, (supra) relying on direct evidence to establish the exact mental status of the appellant is a treacherous path. To appreciate the state of the mind of the appellant at the time of the commission of the offence, we are obliged to consider the surrounding circumstances.

36. With regard to the burden of proof, the law is that the burden of proof lies on the defence to show that the accused person suffered mental challenges at the time of committing the offence. This principle of law was stated by this Court in *C N M vs. Republic* [1985] eKLR thus:

> " ...where an accused raises the defence of insanity, the burden of proving insanity rests with the accused, because a man is presumed to be sane and accountable for his actions until the contrary is shown. But while this burden rests with him, it is not such a heavy one as rests on the prosecution, and indeed after considering the evidence it is to be decided on the balance of probability, whether it seems more likely that due to mental disease the accused did not know what he was doing at the material time, or that what he was doing was wrong, and so could not have formed the intent to kill the deceased."

37. Similarly, in *BGKM vs. Republic* [2015] eKLR, this Court stated at paragraphs 24 and 25 thus:

> " 24. We agree with the trial court that the burden lies on the accused to prove, on a balance of probabilities, that he was insane before he committed the offence.

The case of *Marii v/s Republic* [1985] KLR 710 emphasized that approach, thus:-

> "The burden on the Accused to prove insanity is not as heavy as the one on the prosecution. The burden is discharged by proving on a balance of probabilities that it seemed more likely that due to mental disease the Accused did not know what he was doing at the material time or that what he was doing was wrong, and so could not have formed the intent to kill the deceased."

25. With respect however, before an accused is called upon to discharge the burden, he must put forward the defence of insanity. That requirement was set by this Court in the PMI case (supra) when it posed the question:

> "The accused not having raised the defence of insanity under section 12 of the Penal Code at the trial, was the trial judge entitled to make a special finding of insanity. Or, is it exclusively for the accused to raise the defence of insanity?"

38. As we have already stated, the defence of insanity is concerned with the appellant's state of mind at the time he committed the offence. The defence placed their reliance mainly on the contents of a letter dated 27th September, 2010 by one Dr Syengo Mutisya where it is indicated that the appellant had been admitted and treated for schizophrenia. The letter also declared the appellant fit to stand trial. This letter is of probative value in determining whether the appellant was accorded a fair trial. However, the same value cannot be attributed to it in an attempt to establish the appellant's state of mind as at the time of the commission of the offence. In support of this view, we refer to the decision in *P I M vs. Republic* [1982] eKLR, where this Court considered a report made a by a doctor and stated as follows:

> " It emerged from the oral evidence of this witness that the appellant had been a patient at the mental hospital "for some time" between the date of the alleged offence and the trial. The doctor was wrongly permitted to put in evidence as Exhibit 3 a report written by her some two days before she gave evidence. There was nothing material to the case in that report and if there had been the evidence should have been given orally. In that report there are references to the appellant suffering from paranoid schizophrenia, it is not stated when, and to his suffering from epilepsy of a psychosensory type at the time of the alleged offence. This form of epilepsy was diagnosed as a result of the appellant's complaints at the hospital that he had hallucinations of smell from time to time. At no point in her evidence did this witness attempt to demonstrate that the appellant was legally insane at the time of the death of the child, by reason of either of these complaints."

39. In the case at hand, PW2 testified on how the appellant stalked the deceased. He also testified to witnessing the appellant follow the deceased from behind into the slaughter house. The appellant then got a panga and proceeded to assault the deceased. PW2 further testified that the appellant cut the deceased on the head, and after the deceased fell down, he continued to cut him three more times on the neck. From this chronology of events, the only conclusion we are able to arrive at is that the appellant took his time to hatch a plan for the execution of his actions.

40. It is also the evidence of PW2, PW4 and PW5 that once done with assaulting the deceased, the appellant took off towards the police station. In his defence, the appellant also states:

> " … I hit him with my panga on the head twice. He suffered injuries. I decided to go to the police station to report. A crowd followed me and were hostile to me… I met four police officers on the road who saved me from the crowd…"

41. This evidence only serves to prove that the appellant was well aware of the consequences of his actions. It is that ability to appreciate the consequences of his actions which informed his decision to run away and seek help in a police station or from the four police officers who were on patrol.

42. Additionally, the appellant also narrated his version of events including the nature of the discussion that he had with the deceased, which we already found not believable. In his defence, the appellant also confirmed the assertion of the prosecution's witnesses that the deceased was his brother-in-law. The two were therefore not strangers but persons well known to each other. The prosecution had also led evidence alluding to the fact that the appellant at the time of the offence was separated with the deceased's sister.

43. Surely, based on the chain of events, the meticulous planning involved and the act of running away to the police station, it cannot be said that these were mere impulsive actions of a person labouring under a defect of reason as not to know the nature and quality of the act he was doing. We also note that the appellant did not pursue this defence during the trial. His defence then was basically one of provocation which we have already found unbelievable and the learned Judge was right to dismiss it. Indeed, the appellant alluded to having been engaged in the business of selling meat at the time of the offence. This evidence resonated with that of PW4 who testified that the appellant used to sell meat. The appellant's action of engaging in business cannot be said to be the actions of a man suffering from mental disease. It was incumbent upon the appellant to raise the defence of insanity at the trial and also prove it on the lower standard of a balance of probabilities. He did not do so.

44. Setting aside a finding of guilty but insane entered by the trial court, this Court in *BGMK vs. Republic* [2015] eKLR observed that:

> " The record herein shows that the appellant was represented by counsel at the trial but at no time was it stated that the appellant would raise the defence of insanity. His plea was simply "not guilty" to the charge of murder and the prosecution went ahead to prove that charge. The pieces of evidence that suggested that he acted abnormally at times, but which did not dislodge the presumption of sanity, came from the prosecution. It is our finding therefore that the trial court had no legal or factual basis for making the finding that the appellant had set up a defence under section 12 which he did not prove."

45. The appeal before us paints a similar scenario with that of the cited case. Our perusal of the trial record confirms that no defence of insanity was raised and neither was there any attempt to establish it even by way of cross-examination. In our view, the belated move by the appellant to exonerate himself from the crime by relying on the defence of insanity is another attempt to evade the inevitable punishment that his heinous act must attract.

46. In essence, we find that the defence of insanity is, at this stage, not available to the appellant. From the record, it is clear that the appellant was capable of appreciating his actions and the subsequent consequences of his actions as at the time of committing the offence.

47. The appellant has also raised an issue that his rights under Article 49(1)(f) of *the Constitution* were infringed during trial. We must mention at this point that the current Constitution of Kenya came into force in 2010 and was not applicable back in 2007 when the appellant committed the offence. Be that as it may, this issue was not raised with the trial Judge. From the record, we cannot tell whether the appellant was arraigned in court within the stipulated timelines or not. All we know is that the offence took place on 6th March, 2007 and the appellant was arrested on the same date. The first appearance in court by the appellant was on 21st May, 2007. Even though the period seems long, it is our view that the matter ought to have been raised with the trial Judge in the first instance. This would have given the learned Judge an opportunity to call for an explanation from the prosecution in a bid to determine the level and length of delay. Indeed, the proceedings of 21st May, 2007 start with the order of the trial Judge directing that the appellant be taken to Mathare Mental Hospital for examination and treatment. The record does not disclose what informed the issuance of this order and it is most likely that other proceedings had taken place before that date. The appellant's counsel did not also make any useful submissions on this point to assist us in making a just determination. We therefore find the appellant's claim that he was held in custody beyond the 14 days that was stipulated by the retired Constitution as the time within which an accused person charged with certain offences was to be presented in court has not been proved. This ground of appeal, like the other grounds before it, must therefore fail.

48. The upshot of the foregoing is that the appeal against conviction is without merit and is hereby dismissed.

49. The final issue for our determination is sentence. The learned Judge sentenced the appellant to suffer death. This was way back on 4th March, 2013. We cannot find fault on this sentence by the learned Judge since the law then was that courts ordinarily applied Section 204 of the Penal Code in its strict terms. However, following the decision of the Supreme Court in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR which took away the mandatory aspect of the death sentence in murder cases, it is our view that the appellant should benefit from the fruits of this change in the law.

50. In this case, the appellant was a first offender, with a wife and two children. His mitigation was also that he was the sole breadwinner and that his children depended on him. His age was estimated to be 36 years. We also note that the appellant was a brother-in-law to the deceased. The aggravating factors are that the appellant attacked the deceased inside the slaughter house without any engagement whatsoever between him and the deceased. He repeatedly cut the deceased thereby giving him no chance to survive. In the circumstances and upon considering the mitigating and aggravating factors, we reach the conclusion that the death penalty imposed by the trial court was harsh considering the fact that the appellant was a first offender. The death sentence is therefore set aside. The appellant is instead sentenced to 30 years imprisonment from the date of his arrest on 6th March, 2007 as there is no evidence on record showing that he was ever released on bail during his trial.

DATED AND DELIVERED AT NAIROBI THIS 3RD OF MARCH, 2023

SIKE-MAKHANDIA

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

....

JUDGE OF APPEAL

W. KORIR

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR