



REPUBLIC OF KENYA



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**Kamau v Republic (Criminal Appeal 64 of 2021)
[2023] KECA 950 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KECA 950 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 64 OF 2021
MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA
JULY 28, 2023**

BETWEEN

SUNDAY MACHARIA KAMAU APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nairobi
(J Wakiaga, J.) dated 28th January 2020 in HC.CR. No. 87 of 2015)*

JUDGMENT

1. Sunday Macharia Kamau, the appellant herein, comes before this Court by way of a first appeal, having been convicted and sentenced to death by the High Court (J. Wakiaga J) on 28th January 2020.
2. The appellant 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 the morning of 29th August, 2015 at Kambi Moto estate in Huruma area within Nairobi County, murdered Florence Wangechi.
3. After a full trial in which the prosecution called eleven witnesses, the trial Judge, (Wakiaga, J) found that the prosecution had proved its case against the appellant beyond reasonable doubt and consequently convicted him and sentenced him to death.
4. In order to contextualize the appeal, we shall give the facts in a summary form. The facts as accepted by the trial court were that PW1, Ann Wanjiru Waithera the appellant's older sister, while at home, on 29th August, 2015 heard a knock on the door at around 30 am with the appellant calling her to open the door for him.

On asking what had happened, the appellant told her that he had fought with the deceased and had stabbed her with a knife; and he wanted her to go and check whether the deceased had died. PW1 then



went to the house of the deceased's sister (PW2) which was nearer to hers, compared to the appellant's house and informed her, that the appellant had stabbed the deceased. She then took her children to her elder sister in Kariobangi south and informed her that their brother had stabbed his girlfriend and she was not sure whether she had survived. The elder sister, Topister Njoki then called PW2 on phone and the latter confirmed that the deceased had died.

5. PW2, Jenifer Wanjiku Njeri was a sister to the deceased. She testified that on 29th June, 2015 at about 6.30 am, PW1 came to her house but did not enter, and informed her that the appellant had stabbed the deceased. PW2 then ran with her cousin to the deceased's house and found the door locked from outside. When she opened the door, she found a basin full of bloody water and there was blood everywhere, the deceased was on the bed and, her top was burnt. She called the deceased who turned and faced her but looked like she would die in a short while. She left the room crying and her cousin, PW5, Kelvin Kanyago went for a motor vehicle to rush the deceased to hospital. Sarah Muthuri, PW2's aunt entered the house and also confirmed that the deceased had not died. The deceased was then put in a taxi but died immediately thereafter. The deceased had informed her that the appellant was trying to be her boyfriend and PW2 warned her against it and to be careful.
6. PW3, Sarah Muthoni, was an aunt to PW2 and the deceased. She stated that she knew the appellant, as he would come to her house together with the deceased. She knew them to have been in a relationship for two weeks. On 29th August, 2015 at about 30 am she heard noises outside her house and on checking found PW2 crying, then PW2 told her that the appellant had killed the deceased. She ran to the deceased's house which was three plots from hers and pushed the door open. She saw blood on the floor and blood stains everywhere including the chairs and bed. The deceased had not died by then because when she called her she turned her head towards her and responded by making a sound. The deceased's trouser had been pulled down to the knees and there were knife wounds on her thighs. The deceased's blouse had been burnt up to her breasts and the beddings too had been burnt. PW5, Kevin Kanyago came with the taxi, they put the deceased in and headed for Johnsaga police post where they were advised to rush her to hospital. They met the ambulance of blue house hospital which they stopped. The medical personnel checked the deceased and pronounced her dead. They still proceeded to NCCK hospital to confirm whether the deceased had died and the doctor on duty confirmed her death.
7. PW4 Topister Njoki, an elder sister to the appellant stated that on 29th August 2015 at about 8.00 am, PW1 informed her that the appellant and the deceased were drunk and got into a fight, and the appellant stabbed the deceased with a knife. PW5, Kelvin Kanyago, who was PW2's cousin stated that PW1 had come to PW2's house and informed them that the appellant had stabbed the deceased. Together with PW2, they went to the deceased's house and PW2 entered the house then came out crying saying that the deceased had been killed. PW2 went to call PW5's mother (PW3) who came and said the deceased was still alive and asked for a taxi. PW5 found a taxi which came and took the deceased to hospital. He was left closing the door to the house and thereafter proceeded to Huruma police station, following his brother, PW6 who had gone to report.
8. PW6, Joseph Mwangi Muthoni a cousin to the deceased stated that on 29th August, 2015 PW2 called Joseph Mangi Njeri on phone, who he was with, and told him that their sister had been stabbed with a knife. Joseph Mangi Njeri asked PW6 to escort him to Huruma police post where they saw the body of the deceased and confirmed that she had died. The police instructed them to take the body to Kenyatta University mortuary accompanied by one police officer. PW7 PC Lamak N. Ngao was the arresting officer. He booked the appellant and charged him with the offence of murder. PW8 Anna Wangechi Ndemeu was the government analyst who did the analysis of item 1- finger nails for right hand marked A2 of the deceased, item 2-finger nails for left hand marked A1 of deceased, item 3 - vagina swab mark



B1 and B2 of the deceased, item 4 - light blue T- shirt marked B indicated of the appellant found in the deceased house, item 5 -blood sample marked E indicated of appellant, item 6 - blood sample marked C indicated of deceased, item 7 - a knife marked T, item 8- Metal rod marked G.

9. The following were his findings; the metal rod and the finger nails were not stained with blood, high vaginal swab (HVS) was not stained with semen or spermatozoa, the knife was lightly stained with human blood. On evaluating the DNA profiles, item 1 and 2 - finger nails generated profile that matched those generated in item 6 of the deceased with a probability of a math of 1.8. DNA from blood stains obtained from T-shirt of accused matched the DNA profile generate, the DNA profile from the blood stains from the knife matched the DNA profile for blood of the deceased, the finger nails were of the deceased, the finger nails did not have the blood stains but he was able to generate DNA profile from them that matched the deceased.
10. PW9 PC Manava Musamusi stated that on 31st August, 2015 he was called by OC Crime to attend a post mortem. The deceased's relatives identified the body of the deceased. PW10 CI George Jobando was the investigating officer. He stated that on 29th August, 2015 a crowd came to the station and informed him that a certain lady had been stabbed and had died on the way to hospital. PC Samuel Ng'etich and PW9, went to the deceased's house and found fresh blood all over. PW9 conducted a search and found a kitchen knife with blood stains and a bolted club. He found out that the appellant and deceased were lovers and the appellant would spend the night in the house of the deceased and this had gone on for a year. The deceased had another boyfriend called Zamba and the appellant knew of this relationship. On that particular night, the deceased had requested the appellant for permission to go and have fun with Zamba which she did. Later Zamba was expelled from the club and the deceased called the appellant to join her at the club. The appellant came and joined her but later left the deceased with Zamba, who had come in later and went home. At about 3.00 am the deceased left Zamba and went home to join the appellant. A fight then ensued between the two and the following morning, the appellant reported to his sister that he had stabbed the deceased. He was aware that the appellant was examined on 22nd September, 2015 and he made a mental assessment report.
11. PW11 Oduor Johansen, a government pathologist produced the autopsy report of the deceased. He opined that the cause of death was multiple injuries due to penetrating force trauma. He collected blood, vaginal swab and nail clippings for analysis and handed over to the investigating officer.
12. In his defence, the appellant stated that he stayed in Kariobangi North but worked at Huruma. He denied committing the offence maintaining that on 30th August, 2015 he received a call from PW4 at about 5.30 pm informing him that something had happened and he was being sought. PW4 told him to go to Huruma at John Saga police post. When he got to 200 metres from his house, he bought a cigarette at some shop and gave Kshs. 500/-. While waiting for his change, a crowd ambushed him with some deliberating whether to exercise mob justice on him. They took him to the police station where he was re - arrested and locked up in the cells.
13. As already stated ,the trial court convicted and sentenced the appellant to death, and aggrieved by the conviction and sentence, he has proffered the instant appeal on 5 grounds being that the trial Judge erred in law and in fact in meting out a death sentence notwithstanding the mitigating circumstances to wit; the appellant was remorseful; that he was incarcerated when he was twenty (20) and has since served eight (8) years, thus well rehabilitated; that he has no prior convictions or criminal records; that the appellant has maintained good behavior and has come to own up to the offence he committed and that the purpose of the criminal justice system is to ensure behavioral change of the offenders and to integrate them back to the society. We have emphasized this one ground because when the appeal came up for plenary hearing, the appellant abandoned the appeal on conviction which had been covered by the other grounds. Instead he elected to pursue the appeal on sentence only.



14. The appellant filed submissions dated 23rd March, 2023 and the respondents also filed submissions dated 7th February, 2023.
15. When the appeal came up for hearing through the online digital platform, Mr. Njanja, learned counsel appeared for the appellant and the State was represented by Ms. Matiru, learned prosecution counsel.
16. In his submissions, Mr. Njanja for the appellant stated that he was content with his written submissions and would not add anything save to reiterate that the appellant had abandoned the appeal against conviction and was only appealing against the sentence. He submitted that: before the sentence was pronounced, the appellant had mitigated by stating that he was remorseful and had pleaded for leniency but despite mitigation, no consideration was given by the court; and that his mitigation seemed to have served no purpose in the eyes of the trial court yet the law states that where there is mitigation, the court has an obligation to consider those circumstances before sentencing. The appellant relied on the case of *Francis Karioko Muruatetu & another vs. Republic* (2017) eKLR to support his submission that the Court ought to consider mitigation by an accused and impose an appropriate sentence.
17. The appellant further submits that he was twenty (20) years old as at the time of the said offence and therefore of limited knowledge and thus the offence was committed due to anti-social tendencies; that in the eight (8) years that he has been incarcerated, he has come to self-reflect, owned-up his previous mistakes and is now a mature and well-behaved individual. He has an impeccable good behaviour record in prison, which fact can be attested to by the Prison authorities at Kamiti prison; that consequently there is no reason to maintain the death sentence that was imposed by the trial court and that it is not too late in the day for this Court to intervene and correct the error made by the trial court by interfering with the death sentence and commuting it to a prison term.
18. On her part, Ms. Matiru, stated that on the issue of re-sentencing, there were guidelines that the Court would consider such as age of the offender and whether he was a repeat offender and that the Court, in its' discretion could reduce the sentence from death sentence to life imprisonment. She further submitted that the sentence meted out to the appellant was in accordance to the provisions of the law.
19. We note that the ground of appeal revolves around the legality of the death sentence. Legality of a sentence is a question of law. This Court in *Timothy Orwenyo Missiani vs. Republic* [1979] eKLR held as follows:

“On a second appeal to this Court a party may appeal “on a matter of law not including severity of sentence) but not on a matter of fact”; see section 361 (1) of the *Criminal Procedure Code*. As we have already observed, sentencing is clearly treated in this provision as a matter of law. It appears to us therefore that if any question as to sentence is raised before us which does not merely relate to the severity of the sentence, we have jurisdiction to consider it. Thus in *Gopalbhai Nathubhai Mistry v R* [1957] EA 368, where the court enhanced a sentence without giving the appellant an opportunity to show cause, the Court of Appeal set aside the sentences and remitted the case to the Supreme Court with a direction to impose sentences after hearing the parties. Also, a second appeal would seemingly lie against a sentence which was unlawful as being in excess of jurisdiction; see *Hassamali Jamal v R* (1949) 16 EACA 143.”



20. As we address the question of the sentence it has to be kept in mind the appellant, in a murder most foul stabbed the deceased severally and also burnt her clothes. On the sentence the trial Judge stated as follows:

“The convict is sentenced to suffer death as in law provided for.”

The trial Judge is very clear in his ruling that in imposing the death sentence, he had considered that the appellant’s mitigation statements. The trial Judge held:

“MITIGATION

4. In mitigation it was stated by Mr. Nyachoti that the convict was aged twenty (20) years at the time of the offence having grown up under very challenging circumstances in Huruma. It was contended that the same had been truthful to the court that he had found himself in substance abuse but had reformed and was at the time engaged in lawful business of printing T-shirts and that he acted in the heat of the moment, in that their relationship was young and another man had come in between them. He sought lenient sentence to be given a chance to reform.
5. On behalf of the victim- Mr. Chege submitted that the victim was a young lady at the prime of her life with one child who had been deprived of the mother’s love leaving the responsibility with her mother. He therefore sought for death sentence since her death was painful to the family.
6. On behalf of the State, Mr. Okeyo also sought for death sentence on account of the fact that the convict was a misfit in society.

SENTENCING OBJECTIVES

7. Judiciary Sentencing Policy Guidelines list the following sentencing objectives:
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 - 1. Retribution: to punish the offender for his/her criminal conduct in a just manner.
 - 2. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 - 3. Rehabilitation: to enable the offender reform from his /her criminal disposition and become a law abiding person.
 - 4. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
 - 5. Community protection: to protect the community by incapacitating the offender.
 - 6. Denunciation: to communicate the community’s condemnation of the criminal conduct.
8. In passing sentence the court must have the above objectives in mind. The fundamental purpose of sentencing is to contribute along with crime



prevention initiative, respect for the law and the maintenance of a just, peaceful and safe society by imposing just sentences that have any one or more of the above objectives.

10. having stabbed the same the convict left herin that state and went to his sister's house whom he asked to go and find out whether she had died. The accused used both a kitchen knife and a bolted club 'rungu' to inflict fatal injuries upon the deceased. The death must have therefore been brutal and premeditated. His claim that he was annoyed by the presence of another man in the relationship cannot justify the injuries inflicted on the deceased.
11. Whereas the convict has sought for leniency on the basis that he is a young man who has suffered parental depravity, I am of the considered opinion and find that parental depravity does not justify moral depravity. He had the choice of walking away from the deceased if he did not like her life style. I have said before and shall keep on saying that no man or woman should die simply because he/she is in a relationship. She had a right to be with the convict or with anybody else and the mere fact that she had invited the convict or that the same invited himself into her house did not give him a right over her body and that she retained the right to say "my body my choice." she had a right to be with any man or woman if she so wished.
12. Having looked at the circumstance of the offence, the mitigation by the convict and the pre-sentencing report I am satisfied that the convict does not understand the language of rehabilitation and therefore the only language he understands is deterrence. I have further taken into account the rise in number of deaths arising from domestic violence and is satisfied that a deterrence sentence is the most suitable objective herein. This is one of those cases which the Indian Supreme Court has classified the Rarest of Rare case where death sentence is recommended as the same was socially abhorrent in nature. See *BACHAN V STATE OF PUNJAB* (1980) 2SCC 684”
21. In view of the foregoing, the argument by the appellant that his mitigation was not taken into account in the sentence flies in the face of the ruling. In as much as the trial court was obligated to consider the mitigation factors, just because the matter did not go the appellant's way, does not mean the trial court did not consider them. The trial court was not obligated to sentence in the appellant's favour, but was obligated to consider the mitigation factors. We hasten to add that the maximum sentence for offence of murder, upon conviction is death. The oft cited case of *Francis Karioko Muruatetu & another vs. Republic (2017)* eKLR did not abolish the death sentence but declared its mandatory nature under section 204 unconstitutional as it had taken away the discretionary power of the Court. Where circumstances justify, an accused person can still be sentenced to death.
22. In our view, one glaring fact is that the appellant stabbed an innocent person to death, who must have suffered a painful death as she sustained multiple stab wounds all over the body. In passing sentence, the trial Judge explained himself properly and gave reasons for the sentence that he meted out, having considered all the mitigation factors put forth by the appellant. As already stated, the trial Judge imposed death penalty. The emerging jurisprudence after the oft quoted Muruatetu case (*supra*) is that a Court should consider the mitigating factors and impose an appropriate sentence. In our view, where circumstances justify to keep away an accused person from the society, the Court is at liberty to pass any sentence as provided in the law. In the appeal before us, the appellant stabbed the deceased in a very atrocious and horrifying manner. The appellant even had the guts to announce to all and sundry



that he had stabbed the deceased to death. In our view, the sentence that was meted was lawful in the circumstances and we will only interfere with it to the extent that we commute the death sentence to life imprisonment.

23. Consequently, this appeal succeeds only to the extent that the sentence that was imposed is hereby set aside and substituted with life imprisonment.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

