Odede v Republic (Criminal Appeal 174 of 2017)
[2023] KECA 1092 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1092 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 174 OF 2017

W KARANJA, F TUIYOTT & JM NGUGI, JJA

SEPTEMBER 22, 2023

BETWEEN

DANIEL NYANJONG ODEDE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Homabay (Majanja, J.) dated 3rd November, 2016 in HCCRC No. 69 of 2013)

JUDGMENT

1. The appellant, Daniel Nyanjong Odede, was the accused person in the trial before the High Court at Homabay in Criminal Case No. 69 of 2013. He was charged with the offence of murder contrary to section 203 as read with 204 of the *Penal Code*. The particulars of the offence were that it was alleged that on the 26th day of October, 2013, at Kowino sub-location, Rachuonyo South, Homabay County, Daniel Nyanjong Odede, murdered Irene Atieno Nyanjong.

2. The appellant pleaded not guilty and a fully-fledged hearing ensued. At the conclusion of the trial, the learned judge convicted the appellant and sentenced him to death.

3. The appellant was aggrieved by that decision and has lodged the present appeal. In his Supplementary Memorandum of Appeal, the appellant raised three (3) grounds of appeal, which are that:

    1. The Learned Trial Judge erred in law and in fact by drawing inferences and reaching conclusions that were not supported by evidence.

    2. The Learned Trial Judge erred in law and fact by not warning himself against the danger of relying on the circumstantial evidence noting that the chain of circumstances was broken by the doubt cast through the appellant's defense.

3. The Trial Court grossly erred by failing to find that the mandatory nature of the death sentence as prescribed under section 204 of the *Penal Code* is not only unconstitutional but also unfair in the circumstances and ought to be led by the guidelines on sentencing while exercising their discretion on the same.

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 vs. Republic* [1972] EA 32.

5. At the trial court, the prosecution called five (5) witnesses. The evidence that emerged from the trial was as follows.

6. On October 26, 2013, between 7.00pm and 8.00pm, Kennedy Odhiambo, the appellant's younger brother who testified as PW2, arrived at his homestead. He stated that both he and the appellant have individual homesteads within the same compound, and that while he lives on the upper part of the compound, the appellant lived on the lower part. Their houses are about 80 meters apart.

7. Moments after PW2's arrival at his home, the appellant's children went to his house, crying and reported that their father (the appellant) and mother (deceased) had locked themselves in the house. Due to antecedents, PW2 was afraid to go to the appellant's home alone and so he went to look for his cousin and friends, Peter Ouma, Wycliffe and Ochieng, to accompany him. They then went to the area chief, Tom Ochieng, who directed them to call the assistant chief, Joel Owenga. PW2 also called the village elder, Aoko Nduma. Thereafter, the chief, the assistant chief and the village elder accompanied them to the appellant's homestead, although the assistant chief arrived at the appellant's house before the rest.

8. PW2 testified that upon arrival at the appellant's homestead, the assistant chief knocked on the door to the appellant's house, but the appellant did not open it. When the assistant chief called out the appellant three times and there was no answer, he kicked the door open. The assistant chief entered the house where he found the appellant in the sitting room. He asked the appellant where his wife was and the appellant's response was that she had gone on a journey. The assistant chief started looking around using light from his phone since it was dark and he saw the deceased at the entrance of the door leading to the bedroom. She was seated on the floor while leaning on the door and was completely naked. Her hand seemed broken and there was blood on the floor. She was not able to speak when PW2 saw her. Later, she was taken to hospital and the appellant was arrested.

9. PW2 also stated that the appellant and the deceased had been married for more than fifteen (15) years, and that during that time he never heard them quarrel and neither the appellant nor the deceased told him about the problems they had. Despite this seeming good-character testimony, PW2 testified that the appellant is a "wild and harsh person" and "even a group of four people cannot manage him". He clarified that the reason he was afraid to go to the appellant's home alone was due the fact that he thought they (appellant and deceased) were fighting and also due to respect for an elder brother under the Luo customs.

10. PW1, Joel Owenga, was the assistant chief. He testified that on the material day at about 11.00pm, while at his home, he received a phone call from PW2 who informed him that the appellant had locked the deceased in his (appellant's) house and he could not gain access. PW2 explained that he needed PW1's assistance to find out what had happened since the house was locked. PW2 also informed PW1 that the appellant and the deceased had quarreled during the day and had a fight. Upon receiving that information, PW1 called two members of the community policing, Gordon Odhiambo and

Oyala Odhidhi, and asked them to accompany him to the appellant's home. When they arrived at the appellant's home, they found a crowd of people gathered outside the compound. PW2 was among them.

11. As it was dark, PW1 used his spotlight and went and knocked the door to the appellant's house, while in the company of the two members of the community policing and PW2. At the door, PW1 testified that he saw a spill of blood. He knocked the door, introduced himself as the assistant chief and called out the appellant but there was no response. He tried pushing the door from outside but it was locked from inside. He pleaded with the appellant to open the door. The appellant responded that he would open the door but he did not open. PW1 told him that if he could not see, then he would give him his torch so that he could dress and come out. So, PW1 passed his torch to the appellant and the appellant returned it five minutes later but he did not open the door. According to PW1, the appellant finally opened the door after about twenty minutes.

12. PW1 testified that when he entered the house, he saw two pangas with blood on the table and a wooden rod with a nut. These items were produced during the trial as exhibits 1, 2A, and 2B respectively. PW1 testified that he immediately handcuffed the appellant, using a rope, for fear that he might escape. He then asked the appellant where his wife (deceased) was and his response was that she ran away since they had quarreled.

13. PW1 testified that he searched the house and saw a lot of blood on the floor and on a chair. He followed the blood stains which led to the store and saw that there was also blood on the utensils. He saw the deceased seated on the floor, at the door between the bedroom and the sitting room. She was completely naked and had bruises all over her body, her thigh and hand seemed broken and blood was oozing from her vagina. Later, the police came and arrested the appellant, and took the deceased body to the mortuary.

14. PW1 also testified that a month before the incident, the deceased had gone to him and complained about the appellant. However, when PW1 summoned the appellant, he was told that the deceased had gone back to her home. PW1 also stated that he knew the appellant as a man who was humble and had good relations with his family and neighbours.

15. During cross examination, PW1 conceded that in his statement to the police, he did not record the information given to him by PW2 over the phone and neither did he mention the quarrel between the appellant and the deceased; that he mobilized two of his assistants; that he gave the appellant his spotlight; that he saw blood spilling from the door; that he saw blood oozing from the deceased's vagina; that he saw a fracture on the deceased's thigh; that he found pangas and rungus which were blood-stained in the appellant's house; that he saw blood on the table and utensils; and that he went into the bedroom and store of the appellant's house. He insisted, however, that all those were accurate recollections of what transpired on that fateful night.

16. The third witness to testify was Dr. Peter Ogola, the medical officer who performed the postmortem examination of the deceased. He testified that he performed the postmortem on 5th November, 2013, after the deceased body was identified by PW2 and one Jacob Otieno. He observed that the deceased had multiple lacerations and stab wounds on her face, trunk (neck and waist) and limbs; the lower part of both upper limbs were fractured; there was a perforating wound on her left chest wall; there was blood in her left chest cavity; and there was a wound on her head which was bone deep. He concluded that the cause of death was severe hemorrhage that was as a result of multiple lacerations and perforation of the left lung, caused by a sharp object.

17. The fourth witness was PC Thomas Kareithi, the investigating officer. He testified that he called the prosecution witnesses and recorded their statements. He visited the crime scene two days after the

incident and caused the postmortem to be conducted. He stated that PW2 informed him that the appellant and the deceased had quarreled, and the appellant beat the deceased and locked the house, hence they could not intervene. He also stated that the chief found the appellant with two pangas and a rungu during the time when the deceased lay on the floor, beaten and bruised. Police officers were called and they recovered weapons. PW4 also testified that the appellant accused the deceased of cheating on him and a fight ensued which resulted in the deceased's death.

18. The last witness to testify was PC James Gitonga (PW5). He was the duty officer at the Oyugis police station, on day of the incident. He testified that he received a phone call from PW1, who informed him that a person had killed his wife. PW1 identified the person as the appellant. Thereafter, PW5 rushed to the scene of the incident with some of his colleagues. Upon arrival, they found members of the public, PW1 and the appellant's family members. In the bedroom, they found the deceased who had broken arms and legs, deep cuts on her limbs. There was a blood trail from the door to where she lay lifelessly. They arrested the appellant who had been tied up by PW1. They also took the deceased to hospital whereupon examination, she was pronounced dead. PW5 testified that PW1 recovered two pangas and a rungu which were handed over to PW4.

19. When he was placed on his defence, the appellant denied murdering his wife. He elected to give a sworn statement. He testified that on the material day, the deceased came back home from the market at around 7.15pm, during which time he was listening to the news. Their five children were away. Moments after the deceased arrived, four people entered the house as the door was still open. The appellant stated that there was a safari lamp on top of the cupboard but he was not able to identify any of the four people. They ordered him to sit on the floor and one of them hit him on the forehead, while another one hit his left hand with a walking stick as he tried to block the blow. He fell on the ground and was ordered to lie down. They then took his wife to the bedroom and raped her on the bed, but there was nothing he could do as he was in fear and could not scream.

20. The appellant testified that after a while, he overheard one of the four people telling the others to stop assaulting the deceased and instead, take whatever she had come with from the market. He heard the deceased telling them that whatever they wanted was in the basket, whilst she pleaded with them not to kill her. The appellant testified that there was a momentary dead silence then the appellant heard them beating the deceased again. Thereafter, the four people left and locked the door. The appellant stated that when he recovered, he called his step-mother but her number did not go through. Later, he heard PW1 asking him to open the door. He told PW1 to push the door as he had been tied up and could not open. PW1 pushed the door and entered the house. He said that he told PW1 what had transpired. Police officers arrived and took the deceased to hospital and the appellant was arrested and charged with murder.

21. The appeal before us was argued by way of written submissions by both parties. During the virtual hearing, learned counsel Mr. Omondi appeared for the appellant, whereas learned counsel, Mr. Okango, appeared for the respondent. Both parties relied on their submissions.

22. Counsel for the appellant condensed the issues of determination into two as follows:

    a. Whether the appellant was properly convicted based on circumstantial evidence.

    b. Whether the death sentence meted out against the appellant is lawful.

23. On the first issue, counsel contended that the prosecution evidence suffered the infirmity of an impermissible break of chain of events making it unsafe for the appellant's conviction. In this regard, he relied on the case of *Republic vs. Robert Kiilu Wambua* [2020] eKLR, in which the court made reference to the case of *Teper vs. Republic* [1952] AC, where the court held that it was necessary for

a court to narrowly examine circumstantial evidence before drawing inference of the accused's guilt, to be sure that there are no co-existing circumstances which could weaken or destroy the inference. Counsel also relied on the case of Abanga Alias Onyango vs. Republic in which the court made reference to case of *Republic vs. Michael Muriuki Munyuri* [2014] eKLR whereby principles regarding circumstantial evidence were set out.

24. Counsel argued that the prosecution evidence was marred by inconsistencies. He contended that some of the assertions made by PW1 before the trial court were not recorded in his statement to the police. Specifically, counsel stated that PW1's statement to the police did not contain assertions that: he found pangas and rungus that were probably used to inflict injuries on the deceased; he saw blood spilling on the floor; and he was informed by PW2 that the appellant and deceased had a quarrel and fought earlier on the material day. Counsel also stated that PW2 testified that PW1 arrived at the crime scene before him, and if that was the case, then PW2 could not corroborate events that he himself did not witness. In particular, counsel argued that the testimony of PW2 contradicted PW1's testimony that PW1 kicked open the door to the appellant's house yet PW1's testimony before the trial court was that he tried to push the door but it was locked from inside but that finally, the appellant opened the door. Additionally, counsel argued that PW4 was not present at the scene of crime and merely relied on the information he got from the prosecution witnesses during his investigation.

25. Counsel also argued that PW5 did not state whether the weapons retrieved from the crime scene had blood stains belonging to the deceased or whether at the time of arrest, the appellant's clothes had any blood stains, that would point to him as the person who killed the deceased. To support this argument, counsel relied on the case of Joshua Musyimi Kavemba vs. Republic [2016] eKLR, in which the court quashed the appellant's conviction and set aside his sentence on the basis that the complainant's mother admitted during cross-examination, that she omitted to record crucial details of the case in her statement to the police, which included the fact that: the complainant complained of pains while urinating; she had seen the appellant on the day of the alleged defilement; and the appellant admitted to her that he had defiled PW1 or that he had offered to take PW1 to hospital.

26. Counsel further noted that the prosecution tactfully elected not to call the appellant's children to testify. In this regard, he argued that the children would have shed light on exactly what happened at their home, which incident prompted them to run to PW2's house, while allegedly crying.

27. Counsel contended that the trial court wrongfully dismissed the appellant's defence as false and an afterthought, despite the glaring inconsistencies of the prosecution evidence and relied on the case of *Karanja vs. Republic* [2005] eKLR, in which the court held that the trial court erred in dismissing the appellant's defence on the grounds that he did not call witnesses to corroborate it.

28. On the second issue, counsel argued that the mandatory nature of death penalty under section 204 of the *Penal Code* is unconstitutional and relied on the case of *Misheck Ireri Njagi vs. Republic* [2019] eKLR, which made reference to the Supreme Court case of *Francis Karioko Muruatetu vs. Republic* [2017] eKLR. He stated that the Supreme Court held that courts now have the discretion to issue sentences of a lesser gravity than that of death depending on the circumstances of the case. He urged this Court to consider the appellant's mitigation and the testimony of PW1 who testified during cross examination that he knew the appellant as a humble man who had good relations. Additionally, counsel urged this court to note that the appellant has been in custody since his arrest on 26th October, 2013 to date, and prayed that the same be considered.

29. Opposing the appeal, as regards the first issue, Mr. Okango rejected the appellant's claim that the testimonies of PW1 and PW2 were inconsistent. Counsel contented that what the appellant claimed to be an inconsistency was a mere discrepancy and the bottom line is that the chief gained access to the

appellant's house with great difficulty and found the appellant alone with the deceased's body; despite lying to PW1 and PW2 that the deceased had travelled. In this regard, he relied on the Nigerian Court of Appeal case of *David Ojeabuo vs. Federal Republic of Nigeria* LCN/6791 (CA), in which the court held that:

> " It is settled law that contradiction in the evidence of a witness that would be fatal must relate to material fact and be substantial. It must deal with the substance of a case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial."

30. On the issue of failure to call witnesses, counsel contended that all facts of the prosecution case were comprehensively disclosed and no prejudice was occasioned to the appellant. He argued that the essential ingredients of murder, which are: malice aforethought, cause of death, identity of offender and the fact that the offender was placed at the scene, were proved; and taking into totality the evidence before the trial court, the prosecution proved its case beyond reasonable doubt. Additionally, counsel stated that neither the cross examination of the prosecution witnesses nor the evidence tendered by the appellant, disapproved the prosecution case in any aspect. He relied on section 143 of the *Evidence Act* and argued that no particular number of witnesses is required for proof of any fact.

31. As regards the second issue, counsel submitted that he had no objection to resentencing in accordance to the Supreme Court guidelines set out in *Francis Karioko Muruatetu vs. Republic* (*supra*). He further argued that while it was the appellant's submission that PW1 testified that he was humble and had good relations, it is also on record that PW2 testified that the appellant is very wild and harsh, and that not even four people could "manage" him.

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 two questions for determination:

    a. First, whether the prosecution proved its case beyond any reasonable doubt on the basis of circumstantial evidence as required by law.

    b. Second, whether the sentence imposed is unconstitutional.

34. As regards the first question for determination, it is old hat that the standard of proof in criminal cases is beyond reasonable doubt. In this case, the Prosecution had to prove all the three ingredients of murder in order to secure a conviction. They are:

    (a) the death of the deceased and the cause of that death;

    (b) proof that the accused committed the unlawful act which caused the death of the deceased and

    (c) proof that the accused had malice aforethought.

35. As regards the first ingredient, the record shows that the deceased died as a result of severe hemorrhage due to multiple lacerations and perforation of the left lung, caused by a sharp object. This evidence leaves no doubt in our minds that the nature and extent of injuries inflicted on the deceased, whose body was found in a pool of blood completely naked, was murdered.

36. As regards the second ingredient, the record shows that other than the deceased, the appellant was the only person found at the scene of crime. In his defence, he explained that they were attacked by four assailants who hit him on the head and tied up his hands. At the same time, however, he claimed that when the assailants left, he called his step-mother with his hands still tied – a seeming impossibility.

The appellant did not state whether the alleged assailants tied his hands to his back or front but from his evidence, one can assume that if he was told to lie down as he claimed, then his hands were tied from the back. This would have made it difficult for any person to make a phone call, let alone move. Additionally, both PW1 and PW2 did not find the appellant's hands tied.

37. On its part, the trial court reasoned that the appellant did not suggest to any of the prosecution witnesses that the murder could have been committed by some assailants; and held that the prosecution evidence excluded the possibility of the murder being committed by third parties. The trial court made the finding that it was the appellant's children who alerted PW2 of the possibility that something bad had happened in their house and they did not indicate that assailants had attacked the appellant and the deceased; and that when PW1 and PW2 went to the appellant's house, the door was locked from the inside, which confirmed what the children told PW2 that their parents had locked themselves in the house. Crucially, the trial court found that while the appellant claimed that he had been tied, there was no such evidence when PW2 broke the door and found him in the house. Further, the trial court found that there was no indication of rape and sexual assault nor was such a suggestion made by PW3. Additionally, the appellant did not make any report of the alleged attack to PW1, PW2 or the Police and neither did he report that he had been attacked when he was arrested. Finally, according to the doctor, the injuries on the deceased were consistent with injuries inflicted by the two pangas and rungu found in the deceased's house. Based on the foregoing, the trial court found that the appellant's defence was an afterthought and did not undermine the prosecution case at all; and that his behavior was inconsistent with his innocence. We agree with the holding of trial court on all these points and have nary a point in analysis to add.

38. As regards the third ingredient, the evidence shows that the injuries inflicted on the deceased were so vicious that it was a permissible inference by dint of section 206 of the *Penal Code* for the Learned Judge to conclude that malice aforethought had been established. The fact that the deceased body was found in a pool of blood with multiple lacerations, fractures and perforation on the left lung, caused by a sharp object, was proof that her death was not only unlawful, but was caused with malice aforethought because at the very least there was an intention to cause grievous harm (see section 206(a) of the *Penal Code*). There is no doubt that that the appellant knew that the act of assaulting the deceased with a panga and rungu would cause her grievous harm or death.

39. In analyzing the evidence on record, it is not in dispute that the Prosecution evidence adduced before the trial court was solely circumstantial. When it comes to circumstantial evidence, the courts have established the threshold which must be met before a conviction can be said to be safe. In *Republic vs. Kipkering Arap Koske & another* [1949] 16 EACA 135, the Court of Appeal for Eastern Africa held as follows:

> "In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

40. Further, this Court has, in numerous cases, stated the principles that apply when the prosecution's case is solely based on circumstantial evidence. The cases include Abanga alias Onyango vs. Republic, Criminal Appeal No. 31 of 1990 (UR), *Sawe vs. Republic* [2003] KLR 364 (*supra*), *Mwendwa vs. Republic* [2006] IKLR 137, *Wambua & 3 others vs. Republic* [2008] KLR 142, Peter Mugambi

vs. Republic [2017] eKLR, and *Dorcas Jebet Ketter & Another vs. Republic*. The guiding principles crystallized in these cases are that:

i. The inculpatory facts must unerringly be incompatible with the innocence of the accused.

ii. They must also be incapable of explanation upon any other hypothesis other than that of guilt of the accused.

iii. There must be no other existing circumstances weakening or destroying the inference.

iv. Every element making the unbroken chain of evidence that would go to prove the case must be proved by the prosecution.

41. Looking at all the evidence adduced in the trial court, we are satisfied that the evidence reached this threshold. As the trial court analyzed, there are at least five pieces of incriminating evidence which point unerringly to the appellant's guilt. These include:

a. First, and most crucially, the credible evidence, which was established beyond reasonable doubt, that the Appellant was found in his house, alone, with the lifeless body of the Deceased.

b. Second, the Appellant was found in the same room as the injured Deceased shortly after a witness had been warned that the Appellant had locked himself in the house with the Deceased after a quarrel. In these circumstances, it behooved the Appellant to offer a credible explanation of what had happened in order to displace the inculpatory deduction. His explanation on the stand, however, was fantastically incredulous and easily falsifiable as pointed out above.

c. Third, the injuries found on the Deceased are consistent with grievous assault.

d. Fourth, the Appellant's conduct was inconsistent with his innocence. He refused to open the door when called upon by PW1. He was found, not tied up as his defence claimed. In the moment he was found, he did not offer the narrative he gave in his defence: that some assailants attacked them; and neither did he make any report thereafter of any such attack.

e. Fifth, the Appellant's antecedents complete the loop. His own brother, who the record shows was quite a hesitant witness against him, said he was a "wild and harsh man" who could not be contained by even four people. And the village elder testified that the Deceased had reported to him about the violent quarrels she had been having with the Appellant.

42. Before us, the Appellant has resisted the conclusion that these inculpatory facts unerringly point towards his guilt on two key aspects. First, the Appellant complains that the Prosecution case is mired in too many contradictions to permit the inference. Second, the Appellant argues that the fact that the children of the Appellant were not called to testify should lead to an adverse inference against the Prosecution.

43. In our considered view, these two arguments are unavailing to the Appellant. We have looked at the so-called material contradictions – that PW1 said that he opened the door to the Appellant's house while PW2 said that PW1 kicked the door open and that the statement of PW1 did not contain some information which he testified on – and we have concluded that none of the alleged inconsistences is material enough to introduce reasonable doubts to the Prosecution case. 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 small introduces reasonable doubt to the Prosecution

case. See *Erick Onyango Ondeng' v Republic* [2014] eKLR Criminal Appeal No. 5 of 2013. Here, the alleged inconsistencies do not affect the substance of the Prosecution case.

44. What about the Prosecution's failure to call the children of the Appellant as witnesses? There is no rule in Criminal Law that all witnesses, however multiple and whatever the probative value or their level of credibility, must be called to the stand by the Prosecution. The rule is the opposite: the Prosecution is not bound to call a plurality of witnesses to establish a fact; it is only required to call a sufficient number of witnesses to establish that fact. The complementary rule is one stated in the famous *Bukenya & Others vs Uganda* [1972] E.A.549 where the Court of Appeal for Eastern Africa held that:

> "The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution."

45. The *Bukenya* exception (where the court will draw an adverse inference when a witness is absent) is only applicable where that witness was an essential one; and where the extant evidence is barely adequate to establish a particular fact. Neither of these conditions is present here: the children of the Appellant would not have assisted the court to establish any fact not already established through the testimony of the other witnesses. Differently put, they were not essential witnesses.

46. In the end, we have carefully examined and weighed the inculpatory circumstances against the appellant's protestations of innocence. We are convinced that the cumulative effect of the circumstantial evidence available leads to a firm persuasion that the appellant was the author of his wife's death. In the same vein, like the trial court, we find the Appellant's defence 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.

47. Turning to the question of sentence, the Supreme Court, in the *Francis Karioko Muruatetu & Another vs. Republic* [2017] eKLR held that the mandatory nature of the death sentence under section 204 of the Penal, as was imposed here, was unconstitutional because it stripped the sentencing court of discretion. The Supreme Court held that:

> (66) It is not in dispute that Article 26 (3) of *the Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that Article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non- derogable right. A fair hearing as enshrined in Article 50 (1) of *the Constitution* must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing."

48. As the State concedes, the Appellant here should have the benefit of *Muruatetu* (*supra*). We agree that on the basis of *Muruatetu* (*supra*), the death sentence imposed on the Appellant must be set aside. Having looked at the record, we do not think that there is enough mitigation to inform evidence-based sentencing. We, therefore, think the only just thing is to remit the case back to the High Court for a resentencing hearing.

49. The final orders are that the appeal on conviction fails, and is hereby dismissed. The appeal on sentence is allowed to the extent that the death sentence is set aside. The file shall be remitted to the High Court forthwith for the fixing of a resentencing hearing date.

50. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF SEPTEMBER,2023.

W. KARANJA

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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.

DEPUTY REGISTRAR