



REPUBLIC OF KENYA



**Kihara v Republic (Criminal Appeal 95 of 2016)
[2022] KECA 874 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KECA 874 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 95 OF 2016
W KARANJA, J MOHAMMED & F TUIYOT, JJA
JULY 22, 2022**

BETWEEN

MACHARIA KIHARA APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal from the judgment of the High Court of Kenya at Nyeri
(Ngaah, J.) dated 9th November, 2016 in HC.CR.C. No. 26 of 2008)*

JUDGMENT

1. In the opinion of Dr. Abraham Gatangi, the death of Kihara Ngari (the deceased) was caused by multiple injuries due to a “blunt” and “sharp” force. That death happened on April 22, 2008 at Kambiti Location in Murang’a South District of the then Central Province. The death was blamed on his son Macharia Kihara (the appellant) who was charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#), tried and convicted. The appellant was sentenced to death.
2. At trial, the prosecution case comprised of the evidence of 10 witnesses. Upon receiving information of the death of the deceased from Armstrong Kamande Kihara (PW1), Peter Mwangi Nduati (PW4), a son to the deceased, made his way to the home of the deceased. There he met the wife of the deceased in distress. He saw the body of the deceased lying on a bed. The body had cut wounds to the hands and on the head. As he was contemplating what to do, police officers arrived.
3. One of the police officers was PC. Peter Macharia (PW 10). On arrival, he found the body of the deceased still lying on a makeshift bed. The door leading to the room where the body lay had been broken into. He observed that the deceased’s clothes were stained with mud and blood and formed a view that the deceased had been assaulted outside the house and then dragged into the room.



4. He, together with other officers, suspected a son of the deceased to have been the assailant. That son, the appellant, lived in a house that was 25 meters from the house where the body of the deceased lay. When they went to that house, they found it locked from the inside but with the window open. The officers broke the door and inside it, was a blood-stained fork jembe which they recovered. PW 10 removed the body from the first house and took it to Murang'a District Hospital where a postmortem was performed on it on April 30, 2008.
5. On that same day, 30th April, 2008, A. P. C. Abraham Mungai (PW 5) received a phone call from P. C. Kinuthia regarding the arrest of the appellant at Munero A.P. post. He, together with A. P. C. Galgalo, re-arrested the suspect and escorted him to Makuyu Police Station. He was again re-arrested by PW 10. PW 10 observed that the appellant was wearing a blood stained T-shirt and pink blood stained jacket. The officer marked the T-shirt and jacket and put them in a polythene paper. He, later, "took" the blood samples of the accused and that of the deceased. We use the word "took" as this is what appears on the trial record, but which will have to be discussed further in this decision. He then prepared an exhibit memo (P Exhibit 3) and took the blood samples, the fork jembe, T-shirt and jacket for analysis by a Government Analyst.
6. Analysis was conducted by J. K. Kimani, who was unable to testify because he was away in China on further studies at the time of the trial. Moses Mwaura (PW9), also a Government Analyst, who was familiar with his handwriting and signature testified on his behalf on the DNA profiling that had been conducted. The Government Analyst concluded that the DNA profile generated from the blood of the deceased matched with that of the blood stains on the T-shirt that had been worn by the appellant and on the fork jembe recovered from his house.
7. In his defence, the appellant denied the offence. In his short testimony, he told the trial court that on April 22, 2008 he was at his place of work at Maragua Ridge until 5.00 pm and went home to sleep at 6.00 pm. He sought to clarify that he slept at Maragua ridge which is a distance from Kambiti where his deceased father lived. He denied killing his father and did not know how his father met his death. He denied ever quarrelling with the deceased.
8. Relying very substantially on the outcome of the analysis of the Government Analyst, the learned trial Judge came to the conclusion that, although circumstantial, it pointed to the guilt of the appellant. The learned trial Judge held:

“The logical conclusion that one can make in the circumstances, is that the jembe was the murder weapon and the accused person wielded it at the time material to the deceased's death. Without any explanation as to how the accused person's clothes were stained with his father's blood and how the murder weapon found its way in the accused person's house, there emerges a complete picture that the accused person bludgeoned his father to death and in the process his father's blood splattered on his clothes and the murder weapon.”
9. In this first appeal the appellant raises grounds under four headlines; that the learned trial judge who concluded the trial erred in law in failing to comply with section 200 (3) of the [Criminal Procedure Code](#); in relying on the report of the Government Analyst when there was no inventory of recovery of the fork jembe, alleged blood-stained T-shirt, jacket and of collection of blood samples by PW 10; that there was no evidence on how the blood samples were allegedly taken from the appellant and the body of the deceased and; that the mandatory death sentence is unconstitutional and violates a fair trial.
10. Learned Counsel Wahome Gikonyo, arguing the appeal on behalf of the appellant submitted that at the point Hon. Ngaah, J took over the case from Hon. Serگون, J there was no compliance with section 200 (3) of the Criminal Procedure Code. We are urged to hold that, in the absence of such compliance,



the appellant's rights to fair trial as enshrined in section 200 and Article 50 (1) of the Constitution had been violated. In that regard, this Court's decision in Abdi Adan Mohammed -vs- Republic [2017] eKLR was cited.

11. On the forensic examination, counsel for the appellant made heavy weather on the manner in which PW 10 recovered the fork jembe and blood stained clothes of the deceased and collected blood samples of the appellant and the deceased. It was submitted that no inventory of the recovery or collection of the blood sample was made by PW 10. It being emphasized that the alleged recovery and collection was made eight days after the alleged murder. We were urged to find that the fork jembe, T-shirt, jacket and blood samples were not recovered or collected from the persons said to be recovered from.
12. Further and regarding the blood samples, counsel for the appellant draws our attention to the evidence that it was PW 10 who took the blood stained samples of both the appellant and the deceased. PW 10, we are told, was not a trained medical personnel and that no such medical personnel was called as a witness to give evidence as to how the blood samples were taken and preserved. That in the absence of such evidence, the learned trial Judge fell into error in holding that the blood samples allegedly collected from the appellant and deceased were those analyzed by the Government Chemist. In his oral address at plenary, Counsel emphasized that the manner in which the blood samples were taken violated section 122A of the Penal Code and the results from the DNA profiling were, by dint of section 122D, inadmissible.
13. On the death sentence, we were asked to find that, in line with the decision of the Supreme Court in Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR, the mandatory nature of the sentence abridges the right to a fair trial guaranteed under Article 25 (c) of the Constitution.
14. Answering the submissions by the appellant, Pithon Mwangi, Principal Prosecution Counsel, appearing for the respondent argued that, Hon. Wakiaga, J, informed the appellant of his right under section 200 (3) of the Criminal Procedure Code and the Appellant elected to proceed from where the trial had reached. Counsel further argued that since there was compliance, Hon. Ngaah, J, who completed the trial need not have informed the appellant of those rights again.
15. Regarding lack of inventory for the fork jembe, T-shirt and jacket that were recovered and produced as exhibits, the position of the State is that failure to produce an inventory does not vitiate the trial and is just a procedural step. Citing the decision of the High Court in Stephen Kimani Robe & 2 Others - vs- Republic [2013] eKLR, the respondent suggests that as several witnesses confirmed the existence of the exhibits, that overrode the non- existence of an inventory. Further that the appellant did not object to their production at trial.
16. On the taking of blood samples, the respondent contends that it does not matter that there was no evidence on how the samples were taken. The respondent thinks this to be an afterthought as it was not raised at trial.
17. The State does not fault the appellant's argument on the rationale in Muruatetu but proposes that if the appellant wishes to benefit from resentencing then he must withdraw this appeal and seek a resentence hearing before the High Court.
18. We sit over this matter as a first appellate court and our duty is to re-evaluate the evidence afresh and to draw our own conclusion having regard to the fact that, unlike the trial Court, we have not seen or heard the witnesses testify and due allowance must be given for that handicap. *See Okeno vs. Republic* [1972] EA 32.
19. The record shows that the entire prosecution case was heard by Hon. Sergon, J. In a ruling delivered on 6th July 2012, the learned Judge placed the appellant on his defence and set 24th October 2012 as



the date for defence hearing. It turned out that the date when the ruling was delivered was the last day when Hon. Sergon, J would deal with this matter. The matter was thereafter listed for defence hearing on several occasions and eventually on 27th January 2014, Hon. Wakiaga, J explained the rights available under section 200 of the Criminal Procedure Code to the appellant who, in the presence of his counsel, elected to have the matter proceed from where it had reached.

20. The provisions of section 200 are:

“(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—
(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or [Rev. 2017] Criminal Procedure Code CAP. 75 C44 - 73

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resubmit the witnesses and recommence the trial.

2. Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

3. Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resubmitted and reheard and the succeeding magistrate shall inform the accused person of that right.

4. Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.”

21. Hon. Wakiaga, J did not hear the defence and instead fell to be heard by Hon. Ngaah, J. The record of May 6, 2015 is of significance. On that day counsel, Gichuhi appearing for counsel Mwangi for the appellant stated as follows to the trial Court:

“We shall proceed with the defence hearing, the accused person will give an unsworn statement.”

It would have been clear, we do not doubt, to both the appellant and his counsel that not only had the provisions of Section 200 of the Criminal Procedure Code been complied with by Hon. Wakiaga, J but that the learned Judge himself did not hear the matter.

22. There will be occasion when hearing of proceedings and taking of evidence by a succeeding court which did not hear and record the rest of the evidence may prejudice an accused person and that is why section 200 gives latitude to an accused person to demand the re-summoning and re-hearing of witnesses. That is the objective of those provisions. In the matter before us Hon. Wakiaga, J did not hear any witnesses and so when he informed the appellant of his rights under section 200 and the appellant chose to proceed from where the matter had reached, that compliance was sufficient for Hon. Ngaah,



J to take over and complete the hearing. The purpose of the provisions of section 200 had been met. The challenge on the alleged non-compliance of this statutory provision is without merit.

23. The conviction of the appellant was founded primarily, if not entirely, on the forensic examination of the blood found on the fork jembe, on the appellant's clothes and the blood samples of the appellant as well as those of the deceased. The manner in which these items were recovered and the blood samples taken came under heavy attack by the appellant.
24. Counsel for the appellant argues that as these items were recovered eight days after the date of the death of the deceased, then the police officer who recovered them should have made an inventory at the time of recovery. Although counsel never cited any provisions of statute, we understand him to be relying on the Force Standing Orders touching on exhibits and their recovery. At the material time the operative Force Standing Orders would be the 2001 version. The Standing Orders were made pursuant to section 5 of the now repealed *Police Act* Cap. 84.
25. Standing Order 17 is on recovery of exhibits and their safe keeping up to the time of production in court. It may be needless to reproduce the entire Order but a central requirement, and relevant to the matter at hand, is that an officer who recovers an exhibit must be able to explain to the court how the officer discovered or came into contact with the exhibit, obtained possession of it and safeguarded it during the entire period from the time of possession up to the time of production in Court. The making of an inventory at the time of recovery would be a helpful tool in accounting for its recovery. It also serves as a record of the recovered item. That said, other than the inventory itself, there can be other evidence on how an item was discovered, recovered and kept. So, while an inventory serves as strong evidence of a recovery, it is not the only manner in which recovery of an exhibit can be proved. So what are the circumstances of the matter at hand?
26. PW 10 investigated the death of the deceased. It was his evidence that he recovered a blood-stained fork jembe from the house of the appellant one day after the death of the deceased. Not eight as contended by the appellant! It is true nevertheless, as submitted by counsel for the appellant, that the officer never made an inventory of this recovery. No other witness who may have been present at the time of recovery of the fork jembe gave evidence in that regard. Yet in the short cross-examination of this witness by counsel for the appellant he says this of the recovery,

“I refer to the fork jembe. It had blood stains at the tip. The same was recovered inside the suspect's room.”
27. The defence was unable to shake the evidence of PW 10 as to how and where the blood stained fork jembe was recovered. This evidence is supported by the sketch plan of the homestead of the deceased drawn by the officer at the scene on the day he recovered the supposed murder weapon. The plan shows the house of the appellant vis a vis that of the deceased, in which the dead body lay. This is credible evidence that he visited not just the house of the deceased but that of the appellant and his unshaken evidence that he recovered the fork jembe from the latter house is believable. The totality of this evidence is that it makes up for any weaknesses that may have been created in the prosecution case by want of an inventory.
28. The same can be said of the 'blood' stained T-shirt and jacket which the appellant was wearing at the time of arrest. Indeed, there was no objection to the production of those items nor did counsel for the appellant raise any questions at all as to how they were recovered.



29. The appellant’s counsel refers us to the following evidence of PW 10 on how the blood samples of the appellant and that of the deceased which were subjected to analysis were taken;

“I took the accused’s blood samples and that of the deceased.”

This witness was a police constable and there was no evidence that he was a trained and qualified medical officer. We are urged to find that the provisions of section 122A of the Penal Code were breached and makes any analysis of these blood samples unworthy of admission in evidence.

30. Sections 122A to 122D of the *Penal Code* are on sampling for DNA identification and we think it is important to reproduce all the provisions:

“122A. Senior police officer may order DNA sampling procedure on suspect

1. A police officer of or above the rank of inspector may by order in writing require a person suspected of having committed a serious offence to undergo a DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.

2. In this section—

“DNA sampling procedure” means a procedure, carried out by a medical practitioner, consisting of—

- a. the taking of a sample of saliva or a sample by buccal swab;
- b. the taking of a sample of blood;
- c. the taking of a sample of hair from the head or underarm; or
- d. the taking of a sample from a fingernail or toenail or from under the nail, for the purpose of performing a test or analysis upon the sample in order to confirm or disprove a supposition concerning the identity of the person who committed a particular crime;

“serious offence” means an offence punishable by imprisonment for a term of twelve months or more.

122B. Suspect to comply with order

Where a suspect in respect of whom an order has been made under section 122A resists compliance with the order, members of the police force, under supervision of an officer of or above the rank of inspector, shall be entitled to use reasonable force in restraining the suspect for the purpose of effecting the procedure.

122C. Suspect may volunteer

1. Nothing in section 122A shall be construed as preventing a suspect from undergoing a procedure by consent, without any order having been made: Provided that every such consent shall be recorded in writing Senior police officer may order DNA sampling procedure on suspect. 5 of 2003, s. 14. Suspect to comply with order. 5 of 2003, s. 14. Suspect may volunteer. 5 of 2003, s. 14. CAP. 63 60 Penal Code [Rev. 2014 signed by the person giving the consent.



2. Such consent may, where the suspect is a child or an incapable person, be given by the suspect's parent or guardian.

122D. Order or consent to be proven

The results of any test or analysis carried out on a sample obtained from a DNA sampling procedure within the meaning of section 122A shall not be admissible in evidence at the request of the prosecution in any proceedings against the suspect unless an order under section 122A or a consent under 122C is first proven to have been made or given.”

31. These procedures are in regard to ordering and obtaining consent of a suspect in regard to obtaining a DNA sample. Specific to where the suspect does not give consent are the provisions of section 122A. Some key elements of the procedure are that; they can only be invoked where the investigation is in respect to a serious offence defined for this purpose as an offence punishable by imprisonment for a term of 12 months or more; the order for sampling must be given by a police officer of or above the rank of inspector; must be only where there are reasonable grounds to believe that the procedure might yield evidence tending to confirm or disprove that the suspect committed the alleged offence and; only reasonable force is used in restraining the suspect for purposes of effecting the procedure.
32. This elaborate procedure must be understood in the context that it would be a violation of and intrusion to a suspect's constitutional right to privacy under Article 31 of the Constitution to take a DNA sample without the suspect's consent. That said the right to privacy is not one of those illimitable rights under Article 25 of the Constitution. We think that the provisions of section 122A attempts to strike a balance between the constitutional rights of a suspect and public policy that serious crimes must be investigated and punished. It is for this reason that underpinning the statutory procedure is that it can only be invoked when it is reasonable and necessary and even then using reasonable force and the least intrusive of methods. It is then our further view that because of the constitutional rights element, results of any test or analysis carried out on a sample obtained without adherence to the statutory provisions must be frowned upon and made inadmissible in evidence. Indeed, section 122D provides an express bar.
33. We agree with counsel for the appellant that there was no evidence that the blood sample taken from the appellant and subjected to DNA analysis was taken in compliance with the section 122A of the Penal Code and any results from that analysis would be inadmissible.
34. That said the appellant would not be off the hook, not just yet. This is because those provisions would not extend to blood samples taken from the body of the deceased. The post-mortem report prepared by the doctor shows that some blood was removed from the deceased body for further examination. There is no suggestion that the blood was removed by any other person than the doctor who conducted the postmortem. There is then evidence from PW10 that he took the blood taken from the deceased body for DNA analysis. This evidence is supported by an Exhibit Memo Form prepared by the officer and produced at trial.
35. An important outcome of the analysis conducted by the Government Analyst is that the blood of the deceased matched with blood found on the fork jembe and the appellant's clothes. The appellant having not explained how the blood of the deceased was on the fork jembe found in his house and on clothes he was wearing at the time of his arrest cannot escape culpability. In the end, we agree with the trial Court that there was strong and overwhelming circumstantial evidence that pointed to the guilt rather than innocence of the appellant. That leads us to the inevitable result that the conviction is for upholding.



36. On sentence, the death sentence imposed by the court was in the pre-Muruatetu era and this may explain why the appellant did not offer any mitigation. It may as well have been a futile exercise. For that reason, we do not have a critical factor upon which to review the sentence and the order that commends itself to us is to remit the matter to the High Court for re-sentencing. So that the appellant can quickly know his fate, we make a further order that the matter be mentioned within 14 days at the High Court in Nyeri for directions on re-sentencing hearing. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

