Uvii v Republic (Criminal Appeal 37 of 2018)
[2022] KECA 1418 (KLR) (16 December 2022) (Judgment)

Neutral citation: [2022] KECA 1418 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 37 OF 2018

HM OKWENGU, SG KAIRU & J MOHAMMED, JJA

DECEMBER 16, 2022

BETWEEN

CHRISTOPHER MULI UVII ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Lesiit, J.) delivered on 9th December, 2015 in H.C.CR. NO. 82 of 2005)

JUDGMENT

1. Chistopher Muli Uvii, (the appellant) has preferred this appeal against the judgment of the High Court (Lesiit, J.) (as she then was) dated December 9, 2015, in which he was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the charge were that on July 26, 2005 within Spring Valley Police Station in Nairobi, the appellant murdered Josephat Mitau, (the deceased).

2. The prosecution called a total of fourteen (14) witnesses. The appellant gave an unsworn statement of defence and denied having committed the offence as charged.

3. The evidence adduced by the prosecution was that the deceased who was the Officer Commanding Station (OCS) at Spring Valley Police Station assigned the appellant to be the duty officer at the Police Station on 25th and July 26, 2005. The assigned duty was to last 24 hours meaning that the appellant was to be on duty from 6 a.m on 25th July and 6p.m of July 26, 2005. The appellant reported to work at 11 a.m on July 25, 2005.

4. It was common ground that there was a handing and taking over ceremony of the Gigiri Officers Commanding Police Divisions (OCPD's) from 9.30am to 1pm. A new OCPD was taking over from the outgoing one.

5. CI Alex Mundadi Mwandawiro (PW1) testified that he was a firearms examiner attached to the ballistic laboratory CID Headquarters in Nairobi. It was his further testimony that two cartridges were fired from one gun – Ceska Pistol S No. F5925.

6. IP Thomas Gituku (PW2) testified that he served at the Spring Valley Police Station from 2001 to 2009 and was in charge of the Crime Section in 2005. It was his testimony that on July 26, 2005 (the material day) at around 10 am he went to the office of the deceased to inquire who the duty officer was, as the duty officer had not yet reported on duty. That the deceased informed him that the appellant was the duty officer and at about 4pm on the same day he heard the appellant informing other officers that he was going to his house to take medicine and then rest. That one Cpl Mwaniki

   enquired from the appellant whether he was aware that he was the duty officer. That the appellant did not respond but instead walked away.

7. It was PW2's further evidence that he went to the deceased's office and enquired from him whether he was aware that the appellant was signing off duty. The deceased informed him that the appellant was going to his home shortly and would return to duty thereafter. Subsequently, at about 8pm, the deceased called him and informed him that the appellant had not returned to duty since he left for his house. The deceased informed him that he would personally stand on duty until later in the day. Sgt Baraza (PW9) informed PW2 that the deceased had instructed him to take post as the duty officer that night. It was PW2's further evidence that he went to work early the following day and at around 9.00 am, he saw the appellant at the report office looking unhappy.

8. It was PW2's further evidence that at 2.15pm on July 26, 2005 as he was getting out of the station building, he heard two gun shots from the deceased's office; that he also heard the deceased screaming as if in pain. He saw police officers running out of the same office and immediately saw the appellant leave the deceased's office holding his pistol and was running out of the office. He heard one PC Muhwanga saying "Cpl Muli has killed the OCS". That PC Arama (PW5) was armed with a G3 rifle and attempted to shoot at the appellant as he ran outside the main gate. PW2 asked PW5 not to shoot the appellant but to disarm him instead. The appellant threw his pistol inside the station compound and was immediately arrested. It was PW2's further testimony that he run to the deceased's office and found him seated on his office chair leaning backwards with his eyes closed. That together with other officers they rushed the deceased to M. P. Shah Hospital where he was pronounced dead on arrival.

9. Alex Maluki Mutinda (PW3) testified that he was a nephew to the deceased and was informed of the death of the deceased. In the company of other relatives, they collected the body of the deceased from M.P. Shah Hospital to the City Mortuary where a post mortem was performed in their presence.

10. I.P Mongare Nyamogo (PW 4) testified that the appellant agreed to be on duty subject to him going back to his house at Gigiri Police Station lines in order to collect his medication as he was unwell. That indeed he left the station that afternoon but he did not return on that day. That before leaving the station, the deceased entered in the Occurrence Book (OB) that disciplinary proceedings would be taken against the appellant for failing to report to work yet he had been assigned as the duty officer.

11. PC Josphat Arama (PW5) testified that on July 26, 2005 at about 1.00pm, he received instructions from one Cpl Mwaniki to carry out official duties at the Nairobi area Police Provincial Headquarters together with one PC Koech & 2 others. He prepared to leave, wore his uniform and picked a firearm from the armuory. As he waited for his colleagues, he heard two gun shots from inside the station. It was his testimony that he saw the appellant walk out of the OCS's office. That he challenged the appellant who removed a pistol from his waist. He threatened to shoot the appellant who dropped a pistol on the ground and ran away towards the main gate. He ordered the appellant to stop or be shot.

The appellant obeyed and stopped running and he was arrested by PW5 and taken to the report office at the police station.

12. PC JB Lesiranya (PW6) testified that on the material day he was on duty as the station driver. At about 1pm he entered the station vehicle and heard two gun shots from the station office. He saw the appellant coming out of the office and was ordered by PW5 to stop. The appellant removed a pistol from his pocket and threw it on the ground and was chased by police officers. PW6 further testified that he picked the pistol and handed it over to Sgt Baraza (PW9) who was in charge of the armoury. He heard officers shouting that the OCS had been shot. The deceased was put in the station vehicle and rushed to hospital. It was his further testimony that he drove the vehicle to the hospital where the deceased was pronounced dead shortly after arrival.

13. In cross-examination, PW6 testified that when apprehended, the appellant threw the pistol to him saying "take your pistol" in Kiswahili (chukueni pistol yenu).

14. Sgt Peter Mungai (PW7) was the Deputy Officer in charge of the Special Crime Prevention Unit in 2005. It was his testimony that on the material day at about 4.30pm, the appellant was taken to his office. He was informed that the appellant wished to confess to a crime that he had committed. He took the appellant to a Magistrate – Hon. Margaret Kasera (PW12) to record his confession. It was his further testimony that he sat in PW12's office about 10 feet away from the appellant and that PW12 requested him to sign the confession as a witness.

15. IP Charles Lumatete (PW8) testified that in 2005 he was the Deputy OCS at Spring Valley Police Station. His duties included administration of the station and co-ordination of crime investigations and other duties. He testified that he knew the appellant who was a corporal under his command. That on July 25, 2005 he reported on duty at around 7.40am. He checked the Occurrence Book (OB) and the duty roster. The duty roster indicated that the appellant was on duty on 25th and July 26, 2005. It was his testimony that the appellant did not report to work on July 25, 2005 and he reported this to the deceased. He and the deceased went out of the office together with PW4 and PW2. They called the appellant and the deceased informed him that he was the duty officer as per the duty roster. The appellant responded that he had taken note that he was the duty officer.

16. It was his further testimony that on July 26, 2005 he reported on duty at 7am and perused the OB which had an entry No. 6 to the effect that the appellant was to be charged with the disciplinary offence of willfully and unreasonably failing to report on duty on July 25, 2005. The entry was signed by the deceased on July 25, 2005 at 8.15pm. The deceased directed in the same entry that an inquiry into the offence had to be done and the defaulter (the appellant herein) notified 24 hours prior to the inquiry.

17. It was his further evidence that the appellant booked himself on duty on the material day at 9.35am and took a firearm as he had signed that he had reported on duty. The arms movement register indicated in entry No 8 that the appellant was issued a Ceska Pistol S No 5925 Caliber 9mm and 15 bullets of 9mm caliber and signed for it. After the handing over ceremony by the OCPDs the deceased returned to his office.

18. It was his further testimony that he and PW4 left the compound to visit a friend at the United Nations (UN) offices nearby. While awaiting security clearance, they heard communication from the police radio set that the deceased had been shot. He and PW4 left the UN offices and immediately proceeded to the police station where they found the appellant under arrest.

19. It was his further testimony that he entered the deceased's office which was open. He made an entry in the OB at about 2.30pm of the shooting incident which had occurred at about 2.15pm. He confirmed that he was not aware of a grudge between the appellant and the deceased and that there was no grudge

between him and the appellant. In cross-examination, he denied that as the Deputy OCS he had any intention to get rid of the deceased to take over his office as OCS.

20. Chief Inspector Peter Mungai (PW9) testified that at 8.30 a.m on the material day, he was in charge of the armoury when he issued a Ceska Pistol Serial No F 5925 and 15 rounds of ammunition to the appellant who entered in his own hand entry number 8 in the Arms Movement register that he had received the firearm and ammunition. In the duty column, the appellant indicated that he was reporting as the duty officer.

21. Thiongo (PW10) testified that at around 1. 30p.m, on the material day while at his desk which was located next to the deceased's office, he saw the deceased walk past him and enter his office leaving the door wide open. He then saw the appellant walk into the deceased's office and close the door behind him. After about 2 to 3 minutes, he heard a gunshot and a second gunshot about 5 seconds later. It was his evidence that he jumped out of a window and screamed for help. He then saw the appellant leaving the deceased's office and ran towards the gate. The appellant was challenged to drop the gun which he did and he was arrested thereafter by two officers. PW10 further testified that he went back inside the Police Station into the deceased's office together with the Deputy OCS and PW8 where they found the deceased leaning on the chair with blood oozing from his back. The deceased was rushed to M.P Shah Hospital for medical attention but succumbed to his injuries shortly after arriving at the hospital.

22. Dr Peter Muriuki Ndegwa (PW11) testified that he worked with the Ministry of Health, Department of Forensic Services, medical legal section as a pathologist. On August 5, 2005 he performed a post-mortem examination on the body of the deceased. He observed that internally, the deceased's right lung was perforated and there was right sided haemothorax measuring 2 liters. The liver was ruptured; large bowels were perforated; there was a torn omentum, there was blood in abdominal entry measuring 1 liter; there was a fracture of lumbar vertebral spine with one bullet lodged therein. He formed the opinion that the cause of death was extrangulation/hemorrhage due to multiple organ injuries due to gun shots.

23. Margaret Kasera (PW12), testified that in 2005, she was a Principal Magistrate stationed at Kibera Law Courts. The appellant was taken to her chambers escorted by PW7 to record a confession before her. She cautioned him and recorded that she had warned him that he was at liberty to make the statement and the same would be taken down and could be used as evidence. PW12 testified that the appellant did not sign the caution and that the appellant spoke in English and she recorded exactly what he said. That she read the statement over to him and gave him the statement to read for himself. That he made no amendments and signed the statement willingly. She counter-signed the statement and called PW7 who was outside her chambers to read and sign the statement. It was PW12's further testimony that the appellant admitted that he shot the deceased at close range as he was overwhelmed. That the deceased had insisted that the appellant would be charged for failing to report as duty officer on July 25, 2005 and according to the appellant, the charge against him would taint his record and he could lose his job. He stated that he was frustrated and felt overwhelmed and that he shot the deceased in a rage.

24. PC John Munyi Isaac (PW13) testified that he was the scenes of crime officer. That on August 4, 2005 at about 2pm in the company of Cpl Ruto (PW14) and one Cpl Tanui he took photographs of the body of the deceased at the City Mortuary.

25. Sgt William Ruto (PW14) testified that in 2005 he was attached to Special Crime Prevention Unit based at Gigiri and was the investigating officer in this case. On the material day he was on duty and at about 2pm he was called by Mr Mabeya the deputy in charge of the unit who informed him that a shooting incident had occurred at Spring Valley Police Station, and it was alleged that the appellant had shot the deceased. He proceeded to take over the rifle used in the shooting and kept all the exhibits

in this case in safe custody. He noted from the armoury book that the appellant was issued with a pistol and 15 rounds of ammunition of 9mm.

26. Upon conclusion of the trial, the learned Judge found that the appellant had a case to answer and placed him on his defence. The appellant made an unsworn statement and admitted that he was issued with a Ceska Pistol Serial No FF5925 with 15 rounds of ammunition and a magazine on the morning of July 26, 2005. He further stated that at around 9p.m Cpl Mwaniki asked him to surrender the firearm and ammunition for purposes of handing over between the incoming and outgoing Officer Commanding Police Division (OCPD). He returned the firearm and ammunition and entered in the Arms Movement Register "Returned in Good Order". He returned to his office at around 2p.m and he heard gunshots. He ran away for safety and met PW5 who was armed with a G3 rifle, but as PW5 was asking him what had transpired, he heard PW2 announcing on the police communication that he (the appellant) had shot the deceased. The appellant was then arrested and beaten up before being placed in the cells until around 6pm when PW7 took him to PW12 to make a confession statement. The appellant stated that PW7 warned him not to deny shooting the deceased.

27. The trial court found that the prosecution had proved its case of murder against the appellant beyond reasonable doubt, rejected the appellant's defence and convicted him. In sentencing the appellant, the trial court considered the appellant's mitigation that he was a first offender and that he has 9 children. The trial court found that the offence the appellant committed was serious as it is the ultimate form of insubordination. Further, that there is only one sentence for the offence of murder. Accordingly, the trial court sentenced the appellant to death.

28. Aggrieved by that decision, the appellant filed 2 sets of what he termed as "supplementary memorandum of appeal" and Brief Submissions filed on October 9, 2018 and February 10, 2020. In his grounds of appeal, the appellant faulted the trial court for: failing to warn itself of the danger of convicting the appellant upon contradictory and inconsistent evidence;

> failing to appreciate that the identification/recognition evidence by the prosecution witnesses was not free from the possibility of error or mistake; failing to appreciate that the prosecution had failed to prove its case beyond reasonable doubt; allowing extraneous evidence to cloud its judgment; failing to comply with the mandatory provisions of the *Criminal Procedure Code* Section 200 (3); failing to warn itself of the danger of convicting the appellant whereas the investigations conducted fell below the standard required under Section 23 (III) (IV) (V) (X) & (XI) of Chapter 46 of the Force Standing Orders then in force at Kenya Police Force; violating clear provisions of the *Evidence Act* on confession and further referring to an irrelevant judicial precedent to justify its action; failing to exhaustively analyze the evidence on record as required by law before entering a conviction; and failing to accord the appellant's defence the consideration it deserved in breach of the provisions of Section 169 of the *Criminal Procedure Code*.

29. The appellant further relied on the grounds that the trial court erred in law: in convicting the appellant whereas the prosecution did not prove mens rea within the provision of section 206 of the *Penal Code*; in violating section 200(4) of the *Criminal Procedure Code*; in convicting the appellant while the evidence adduced by the prosecution was contradictory, inconsistent and violated section 26 of the *Evidence Act* on confessions; in convicting the appellant in contravention of his constitutional right to a fair trial as enshrined in article 50(2) of *the Constitution*; and in failing to comply with section 169(1) of the CPC. __

Submissions by Counsel__

30. At the hearing, the appellant was represented by learned counsel Ms Marygoreti Chepseba while the respondent was represented by learned counsel, Mr Gitonga Muriuki. Ms Chepseba elected to rely on the supplementary memorandum of appeal and the written submissions together with a list of authorities.

31. Ms Chepseba urged us to re-evaluate the evidence as required under the *Criminal Procedure Code*. Counsel submitted that the prosecution failed to callCplMwaniki to testify yet his testimony was crucial in the case. On the issue of the confession statement, counsel submitted that it was obtained by force or intimidation since the appellant had stated that he was tortured before issuing the statement. Further, that there were contradictions in the testimonies issued by the witnesses and there was a clear missing link in the testimonies issued, including the manner in which the murder weapon left the armoury.

32. Counsel submitted that the evidence presented by the prosecution was not so watertight as to leave no doubt regarding the culpability of the appellant. That from the evidence adduced, the deceased could have been shot by someone other than the appellant herein. That PW9 informed the court that he issued the appellant with a firearm on the material day but there was no record of PW9 having been on duty on the material day.

33. Counsel further submitted that it was a contradiction of terms for the trial court to cite at length the case of Kanini Muli V Republic [2014] eKLR on retracted confessions while the same has no retrospective effect as the deceased died in 2005.

34. As regards the failure to call crucial witnesses, counsel submitted that PC Muhwanga who allegedly exclaimed that "Cpl Muli has killed the OCS" was not called as a witness. Counsel urged that an adverse inference should be drawn on the failure by the prosecution to call this witness. Counsel decried that the prosecution witnesses were all police officers and the prosecution failed to call civilians to support its case.

35. Counsel further submitted that the trial court misdirected itself when it failed to pay due attention to the reasons for the retraction of the confessionary statement. Counsel submitted that the trial court failed to note that PW7 intimidated the appellant by being inside the office where PW12 was recording the appellant's confession.

36. Finally, on the issue of sentencing, counsel urged us to consider the Judiciary Sentencing Policy Guidelines and the Supreme Court decision of Francis Karioko Muruatetu & Another v R (2017) eKLR.

37. Counsel for the respondent opposed the appeal. He did not file any written submissions but made oral submissions urging that this was a cold blooded murder executed by the appellant against his boss, the deceased. Counsel submitted that the confession by the appellant was made voluntarily and was admitted in evidence prior to the amendment of section 25(A) of the *Evidence Act*, and there was no requirement for a 3rd party to be present. Further, that the confession was made voluntarily, properly admitted and tallies with the rest of the evidence against the appellant. Counsel submitted that the evidence against the appellant was overwhelming despite the appellant having retracted the confession during trial.

38. On the issue of identification of the appellant, counsel argued that this was a case of identification by recognition since most of the eye witnesses were the appellant's colleagues and further that the offence was committed in broad daylight. Counsel submitted that there was no issue of a grudge raised during

the trial and the appellant did not hint at having any differences with his colleagues therefore their evidence had no malice and was truthful. On the issue of mens rea, counsel submitted that the gun shots fired by the appellant as evidenced by the number of ammunition expended and parts of the body where the shots were fired, all led to a conclusion that the appellant had the intention to kill or cause grievous harm to the deceased.

39. Counsel further submitted that the appellant was seen entering the deceased's office and shortly thereafter, two gunshots were heard. The appellant was then seen leaving the deceased's office holding a firearm as he attempted to flee the scene. That when challenged to stop by PW5, the appellant drew his firearm and that the chain of events points to the appellant as the perpetrator of the offence. Counsel submitted that the chain of custody of the murder weapon was properly and sufficiently established through the evidence of PW6 who testified that he recovered the murder weapon which had been dropped by the appellant, PW9 who confirmed that it was the weapon used to commit the offence, which he handed to PW8 who handed it to Cpl Mwaniki.Cpl Mwaniki checked the murder weapon in the Arms Register and thereafter handed it to PW8 who then handed it to the Director of Criminal Investigations (DCIO) who was investigating the matter. The DCIO handed the weapon to PW14 who was one of his officers. PW14 testified that he handed the murder weapon to PW1, the ballistic examiner.

40. On sentence, counsel urged us to uphold the sentence imposed by the trial court. Counsel urged us to consider the *Judiciary Sentencing Policy Guidelines* and the aggravating circumstances present in this case which were that a firearm was used, the victim was shot twice, and was a public figure who died in the line of duty.

41. Counsel submitted that the appellant's defence was considered and properly disregarded by the trial court which deemed it to be fabricated. Counsel further submitted that evidence relied on by the prosecution was both direct and circumstantial.

42. In reply, Ms Chepseba urged us to re-evaluate the evidence. Counsel submitted that Cpl Mwaniki was a vital witness who was not called to testify. That the court should draw an adverse inference from the prosecution's failure to call this and other witnesses.

Determination

43. This being a first appeal, we are required to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis and reach our own conclusion, always bearing in mind that we neither saw nor heard any of the witnesses and have to give due allowance. In the oft-cited case of *Okeno v Republic* (1972) EA 32 the predecessor of this court stated that:

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala v R* (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See *Peters v Sunday Post*, (1958) EA 424)"

44. We have carefully considered the record of appeal, submissions by respective counsel, the authorities cited and the law. We have discerned the following issues for determination:-

    a. Whether the circumstantial evidence relied upon by the learned trial Judge to convict the appellant met the threshold for finding a conviction based on circumstantial evidence;

b. Whether the prosecution's failure to call crucial witnesses vitiated the appellant's conviction;

c. Whether the confession made by the appellant and retracted in the course of proceedings was admissible in evidence; and

d. Whether the sentence meted out against the appellant was lawful in the circumstances.

45. The prosecution case against the appellant was based primarily on circumstantial evidence. On circumstantial evidence, PW2, PW5 and PW10 all testified that they saw the appellant coming out of the deceased's office soon after the shooting. No other person was seen entering or leaving the deceased's office. It was PW5's evidence that he saw the appellant leaving the deceased's office holding a gun which he dropped when he was chased by police officers.

46. Further, that the firearm that the appellant was issued on the material day, Ceska Pistol Serial No F5925 was proved by ballistic evidence to be the murder weapon. PW9 testified that on the material day he issued the appellant with Ceska Pistol Serial No F5925 and 15 rounds of ammunition and that the appellant acknowledged receipt of the firearm by entering entry No 8 in the Arms Movement Register.

47. Further, PW2 testified that on the material day as he was getting out of the station building, he heard two gun shots from the deceased's office and a scream from the deceased. That he immediately saw the appellant leaving the deceased's office holding his pistol running out of the deceased's office.

48. It was PW2's further evidence that PW5 attempted to shoot the appellant as he ran towards the main gate. That he asked PW5 to disarm the appellant and the appellant dropped his firearm and was immediately arrested. PW2 further testified that he run to the office of the deceased and found him seated on his office chair.

49. PW5 testified that on the material day, he was preparing to leave the police station and picked a firearm from the armoury. That as he waited for his colleagues, he heard two gun shots and saw the appellant running away and that he ordered him (the appellant) to stop or be shot whereupon the appellant dropped the firearm and ran away and was arrested by the police officers.

50. On circumstantial evidence, the approach we take is that established in a well-trodden path of this Court in numerous decisions. We take it from *Sawe v Republic* [2003] KLR 364); *Wambua & 3 Others v Republic* [2008] KLR 142; *Mwendwa v Republic* [2006] 1KLR 137, *Kipkering Arap Koskei & Kirire Arap Matetu* [1949] EACA 135), *Peter Mugambi v Republic* [2017] eKLR, and *Dorcas Jebet Ketter & Another v Republic* [2013] eKLR in which the following guiding principles were crystallized:

i. The inculpatory facts must 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; and that

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

51. We have considered the evidence before the trial court against the above principles. We note that the trial court took into consideration various incriminating factors that led it to conclude that the appellant caused the death of the deceased. Section 203 and 204 of the *Penal Code* provide as follows:

203. Murder

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204. Punishment of murder

Any person convicted of murder shall be sentenced to death."

52. It is trite that for the prosecution to sustain a conviction on the charge of murder, there must be proof that the death of the deceased occurred, the death was caused by the appellant and that the appellant had the required malice aforethought. These three essential ingredients must be proved beyond any reasonable doubt. The essential ingredients of murder were outlined in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR as follows:

> "...that the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased; and that the accused had malice aforethought." [Emphasis supplied].

53. There is no contention that the deceased died. PW6, the officer who drove the deceased to the hospital testified that the deceased was pronounced dead shortly after arrival. PW2 also testified that he was one of the officers who rushed the deceased to MP Shah Hospital where he was pronounced dead on arrival.

54. PW3 who was the deceased's nephew testified that he and other relatives collected the body of the deceased from MP Shah Hospital to the City Mortuary where a post-mortem was performed in their presence. This evidence was corroborated by the evidence of PW13 who testified that he took photographs of the body of the deceased at the City Mortuary.

55. The evidence of PW11 (Dr Ndegwa) corroborated the evidence regarding the death of the deceased. PW11 conducted the post-mortem on the body of the deceased. He observed inter alia that the deceased's right lung was perforated, the liver was ruptured, large bowels were perforated and there was a fracture of lumber vertebral spine with one bullet lodged therein. He formed the opinion that the cause of death was extrangulation hemorrhage due to multiple organ injuries due to gun shots.

56. On the issue of the identity of the perpetrator, the appellant was placed at the scene of crime by PW2, PW5 and PW10 and the chain of events from the shooting to his arrest was not broken. PW5 testified that he arrested the appellant after he dropped his firearm. The firearm that he dropped was identified as the same one that he had collected from PW9 on the material day. It is notable that this firearm was examined by PW1, a firearms examiner who testified that two (2) cartridges were fired from one gun – Ceska Pistol Serial No F5925.

57. PW14 who was the investigating officer testified that he took over the firearm used in the shooting and kept all the exhibits in safe custody. It was his further testimony that he noted from the armoury book that the appellant was issued with a pistol and 15 rounds of ammunition of 9mm.

58. The witnesses testified that the shooting happened in broad daylight and most of the witnesses were the appellant's colleagues who had worked with him at the Spring Valley Police Station. The evidence tendered by PW1, PW2, PW5, & PW10 as corroborated by other witnesses directly linked the appellant to the offence.

59. Malice aforethought is defined in section 206 of the *Penal Code* as:

> "(a) an intention to cause the death or to do grievous harm to any person, whether that person is the person actually killed or not;

b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

60. From the weapon used and the injuries inflicted on the deceased, it is clear that the appellant intended to cause the death or to cause grievous harm to the deceased. PW11 testified that the deceased had multiple organ injuries resulting in extrangulation hemorrhage due to gun shots. The injuries were evidently inflicted on the deceased by the appellant with intent to cause grievous harm or to kill him. Those injuries, so intended, are sufficient to establish the element of malice aforethought.

61. Further, the prosecution presented evidence of motive on the part of the appellant. While motive is not a requirement for the offence of murder to stand, it is helpful in establishing the element of malice aforethought. This court in the case of *John Mutuma Gatobu v Republic* [2015] eKLR held as follows:

> " There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought."

62. The prosecution called several witnesses to prove that the appellant had a motive to murder the deceased. The appellant was assigned to be the duty officer on 25th and July 26, 2005. PW8 testified that the appellant did not show up for duty on July 25, 2005 and the deceased recorded in the Occurrence Book (entry No 6) that the appellant was to be charged with disciplinary offence of willfully and unreasonably failing to report on duty on July 25, 2005.

63. In shooting the deceased, the appellant ought to have known that his actions would cause him death or grievous harm. The evidence adduced was sufficient to establish malice aforethought.

64. Our consideration of the totality of the circumstantial evidence tendered by the prosecution as summarized above leads us to the inescapable conclusion that the appellant was responsible for the assault on the deceased, and that he did so with malice aforethought.

65. The appellant has also challenged his conviction on the basis that the prosecution failed to call crucial witnesses. In addressing a similar argument regarding the alleged failure by the prosecution to call crucial witnesses in a criminal trial, this court in *Julius Kalewa Mutunga v Republic* [2006] eKLR expressed itself as follows:

> " ...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

66. In *Bukenya & Others v Uganda*, the East African Court of Appeal held that:

i. The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

iii. Where the evidence called is barely adequate the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution. [Emphasis supplied].

67. We have considered the appellant's complaint that the prosecution did not call a number witnesses in support of its case. The uncalled witnesses include Cpl Mwaniki and PC Muhwanga.

68. Section 143 of the *Evidence Act* provides that:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

The responsibility of the prosecution is to call witnesses who are sufficient to prove its case. In *Keter v Republic* [2007] EA 135, this court held:

> "That the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond reasonable doubt."

69. In the circumstances of this appeal, we find that the prosecution called a sufficient number of witnesses to prove that the appellant committed the crime for which he is charged, the absence of Cpl Mwaniki's evidence notwithstanding.

70. The appellant made a statement to PW12, a Magistrate and gave a detailed account of what led to the death of the deceased The appellant, however, retracted the statement in his defence. In his written submissions, the appellant submitted that the trial court misdirected itself when it failed to pay due attention to the reasons for retraction. The appellant alleged that he was under duress from many of senior and junior police officers all armed and that he was tortured before being brought to court to make the statement.

71. In *Njuguna S/O Kimani & Others V Regina* [1954] EA 316 the former Court of Appeal for Eastern Africa held that the trial court has discretion to exclude a statement which has been obtained by improper questioning or other improper means and that objection to admissibility of such statement was not confined to the circumstances enumerated in the present section 26 of the *Evidence Act*. Article 50(4) of *the Constitution* has reinforced that position.

72. As regards the retraction of the statement by the appellant in his defence, in *Tuwamoi v Uganda* [1967] EA 84 at p 89 Duffus Ag VP said:

> "The present rule then as applied in East Africa in regard to a retracted confession is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but the court might do so if it is fully satisfied in the circumstances of the case that the confession must be true".

73. The above stated principle of law obtains as approved by numerous later decisions of this court as can be seen in *Kinyua v Republic* [2003] KLR 294 at p 299 where this court stated:

> "Considering the evidence adduced during the trial as a whole we are satisfied that the statement by the appellant was properly admitted. That evidence of confession has to be

carefully considered before basing a conviction on it. In the celebrated case of *Tuwamoi v Uganda* [1967] EA at p91 it was stated:-

> "We would summarize the position thus- a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the Court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true".

74. From the record, the learned trial Judge took note of the fact that the appellant had retracted his confession statement in his defence. The learned Judge therefore considered other evidence before the trial court and found that the appellant's confession tallied with the prosecution's case. The learned Judge therefore concluded that the confession was nothing but a true account of what happened at the scene of the crime. The learned Judge found that even in the absence of the confession, there was sufficient evidence adduced by the prosecution to prove its case.

75. Having re-evaluated the evidence as a whole and subjecting it to fresh exhaustive examination as per *Okeno v R* [1972] EA 32 we have come to the same conclusion, as did the learned Judge, that the appellant was guilty of the offence as charged. We accordingly dismiss the appellant's appeal against conviction.

76. As regards sentence, this being a first appeal, the Court is at liberty to consider whether the trial court properly exercised its discretion in sentencing the appellant. From the record, the appellant was sentenced to death. Counsel for the appellant asserted that the sentence meted out on the appellant was, in the circumstances excessive. On the other hand, counsel for the respondent submitted that the punishment meted out was prescribed in the *Penal Code* and the sentence meted out was therefore lawful. Counsel for the respondent submitted that the killing of the deceased was cold blooded and resulted in the death of a Senior Police Officer in the line of duty.

77. We have considered the sentence meted out on the appellant against the facts of the case. The facts show that the deceased, a Senior Police Officer was shot at close range and suffered multiple organ injures leading to his death. The circumstantial evidence established that the appellant shot the deceased twice at close range. This was a needless, cruel and heartless crime on a senior officer in the line of duty by a junior officer.

78. We are satisfied from the nature of the injuries sustained by the deceased that the appellant did inflict them with malice afterthought and that his conviction for murder was merited. We find that the sentence meted out on him was fair and proportionate to his crime and we find no reason to interfere with the sentence.

79. In the result, the appeal fails in its entirety and is hereby dismissed.

80. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR