



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, J.J.A)

CRIMINAL APPEAL NO. 178 OF 2016

BETWEEN

ANNE WAITHERA MACHARIA.....1ST APPELLANT

RUTH WANJIRU MAINA.....2ND APPELLANT

DAVID NJOROGE KIMOTHO.....3RD APPELLANT

JOSEPH KINYURU KIRUMBI.....4TH APPELLANT

ELIUD KIMANI MWAL.....5TH APPELLANT

JOSEPH MACHARIA MAINA.....6TH APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya

at Nairobi (Muchemi, J.) dated 27th February, 2014

in

HC.CR.C. No. 97 of 2006)

JUDGMENT OF THE COURT

The record of this appeal reeks of all that can go wrong in a marriage and a family. A dark mix of jealousy, rage, greed, impatience and pure hatred compounded to turn the marital space into a deadly trap and to convert filial fealty into a grossly cruel patricide, that rank offence that stinks to high heaven. Wife, son, sister-in-law and workers threw all sense and sensibility out of their hearts and coldly calculated a death which they executed with chilling efficiency before dumping the body miles away at the bottom of a water fall in the depths of a forest believing, alas falsely, that as dead men tell no tales, their heinous deed would remain forever hidden from human view. But murder will always cry out, or as Shakespeare would have it, though it have no tongue, it will speak with most miraculous organ. It shrieks out where other crimes merely speak.

It all happened on 12th June 2004. David Macharia, a resident of Kamae Location of Lari district in Kiambu arose that chilly morning from the warm company of PW4 **Hannah Wambui** (Wambui), his second wife and proceeded to his nearby farm to do some work as was his habit. At the farm was the house of his first wife, **Ann Waitthera Macharia** (Waitthera) the first appellant herein. Macharia had five children including the 6th appellant **Joseph Mwangi Macharia** (Mwangi) with Waitthera, but his relationship with her was not the warmest and he never spent nights in her house.

On getting to the farm, Macharia, who was accompanied by a lady known as **Mama Fiona** and another person to work at the shamba, first milked the cows which were at Waithera's compound as he always did, and for which task Waithera had warmed water. He then worked at the farm for the rest of the day. Even though he was expected to return to Wambui's house that evening, he did not do so. Alarmed at the non-return of her husband of 3 years, and father to her daughter, Wambui set out to look for him first at the nearby home of his cousin Gitau, and then at the home of his elder brother **Peter Githinji Mwangi** (Githinji) who testified as PW1. Githinji teamed up with Gitau and two other cousins named **Njunge** and **Wilson Njoroge** and joined in the search for Macharia. This was on 15th June 2004 when they went to Waithera's house.

They found her in the company of her daughter in law. When they asked Waithera about Macharia she asked why they were looking for him before declaring that she had not seen him. This answer led to an argument between Waithera and her daughter in law which aroused Githinji's suspicions as they now suggested that Macharia could be either at his other wife's place or in Limuru.

Some neighbours were in the meantime gathering and saying that Macharia had last been seen fencing a shamba and also tethering a cow to graze.

Githinji and his team reported the matter to Lari Police Station that evening of 15th June 2004 and were advised to return the next day, which they did. The police then arrested Waithera, her daughter, and daughter-in-law. By this time Githinji was convinced his brother must have been killed given a history of rather grave disagreements between him and Waithera and the brutality he was subjected to. Macharia had told him how Waithera used to incite the children to beat him up whenever he did not give in to their demands for property including the shamba, cows and food crops. They would then report him to the police who would arrest him. At one point Macharia's sons broke his arm and his eldest even cut his hand with a panga.

The continuous search for Macharia having yielded nothing, his family including Githinji reported the matter to Kiambu Divisional Criminal Investigations Office on 22nd June 2004 and on the next day the DCIO assigned them CID officers including Corporal **John Ndiga**, the Investigating Officer. Even though the Officer Commanding Lari Police Station had arrested five suspects, Githinji and his family were not happy with the investigations being conducted, hence the report to Kiambu CID. The Investigating Officer visited Waithera's homestead and established Macharia's daily routine as he shuttled between his two homes one where he worked on the farm milking and feeding the cows and the other where he spent nights.

The Investigating Officer involved the local chief **Simon Karanja Gicheha** (PW8) and local police officers as well as a network of informers. He got information that **Eliud Kimani Mwai** (Kimani) was involved and upon his arrest he volunteered to say all he knew which was that he had been given a job by Waithera's sister **Ruth Wanjiru** (Wanjiru) to dispose of a body. He also said that one **Kinyuru** could shed more light. It chanced that on the same way a good samaritan **Francis Githinji Munga** (PW2) paid a visit to the Chief of Kamae at Kinale with a report that he was harbouring a fugitive in his house at Mai Mahiu. That fugitive was the 4th appellant **Joseph Kinyuru Kirumbi** (Kinyuru) who he literally brought up since childhood. Kinyuru had come knocking at his house on the evening of 19th June 2004 seeking shelter as he was on the run having killed someone at a fee. He wanted to flee to Narok but PW2 persuaded him to stay as he would hide him. The blood money had been paid by Waithera and her sister Wanjiru who were his village mates, to the 3rd appellant **David Njoroge Kimotho** (Njoroge); one Mwangi, one Chege and himself, and they duly dispatched Macharia who was their target. PW2 welcomed Kinyuru and on the third day reported to the authorities.

Upon receipt of that report, the Investigating Officer and other officers proceeded to Mai Mahiu led by PW2 but Kinyuru was not in the house. He was not far, however, for he was found in a bar nearby. On seeing the police officers who had arrived in two police vehicles and a civilian car, Kinyuru submitted to the inevitable arrest pleading and offering to show the officers where he and his accomplices had dumped Macharia's body. The team drove back to Kamae and after informing the Forest Guards, went deep into Kamae/Kinale Forest that very night eventually getting to Wagura River, which had a water fall. Kinyuru said it was into and over the falls that the body had been thrown. The search revealed an object at the bottom of the falls wrapped in a sack. As the crowd which had gathered was now baying for Kinyuru's blood, the Investigating

Officer and P.C. Nderitu decided to remove him from the scene for his safety, leaving the forest guards and Macharia's family members to watch over the scene.

The next day, on 24th June 2004, the Investigating Officer returned to the water falls in the company of the Deputy DCIO, the chief and scene of crime personnel arriving there at about 10.00am. The sack was pulled out of the river and the sisal rope tying it undone to reveal its gory contents: it had within it another sack with two heavy stones tied to it obviously to ensure it sank and did not float. Inside the second sack was a corpse wrapped in a blanket and it bore a deep cut in the neck. It was Macharia. Photographs were taken and the body ferried to the City Mortuary. A post-mortem examination conducted by **Dr. Moses Njue** who was the Chief Government Pathologist revealed that the body had a *single transverse incision* which means, in common parlance, that a sharp instrument was used across the neck. It cut through all the main structures of the neck including the skin, muscles and trachea sparing the spinal cord only and

leading to massive blood loss or, in technical terms, *hypovolemic shock*, which he determined to have been the cause of death.

After that morbid find, members of the public mentioned Wanjiru and Njoroge as suspects and they were duly arrested as was the 6th appellant **Joseph Macharia** (Joseph). Njoroge informed the Investigating Officer that they had used a panga to kill Macharia and on 27th June 2004 Waithera led the Investigating Officer, the Chief and administration police officers to her house where she recovered a panga from under the wooden bathroom floor where it was hidden. Earlier on 16th June 2004 while searching Waithera's compound for any sign of Macharia, the **Chief** (PW8), while in the company of two Administration Police Officers **Corporal Ngomoni** and **Constable Mbogo** had found a white jacket that was identified by his wife Wambui as the one Macharia was wearing on the day he left her never to return. The jacket was found hanging on a nail in an outside bathroom in Waithera's compound and it was wet as if newly washed and she confirmed that she had washed it.

The Investigating Officer also interviewed a youngster by the name **Robert Thiongo Wambui** (Thiongo) PW6, who revealed that prior to Macharia's disappearance, he had witnessed long meetings held in Wanjiru's house on two consecutive days attended by Wanjiru, her sister Waithera, Mwangi, and Kimani, the 5th appellant who was Wanjiru's worker. He overheard Wanjiru saying that someone needed to "*be given medicine*" because he was troubling Mwangi a lot. He knew they must have been talking about Macharia because Waithera had often told them about the quarrels between him and his son Mwangi.

That is the gist of the dozen-witness prosecution case as presented against seven persons who were arrested and charged, with Macharia's murder. The trial took a long time from the initial plea in which all seven accused persons denied the charges on 30th January 2007. Judges who handled the case were transferred or were otherwise unable to continue with it but it was substantially heard to completion by F. Muchemi, J. who, on 29th April 2013 found that all seven had a case to answer and placed them on their defences. They each elected to give unsworn statements in which they denied any involvement in the death of Macharia.

The learned Judge by a judgment dated and delivered on 27th February 2014 found the charge of murder proved beyond reasonable doubt as against all the accuseds before court and convicted them, save for **Peter Chege Mwangi** who was found not guilty and acquitted. After hearing detailed mitigation on behalf of the convicted accused persons, and holding, consistently with this Court's decision in **JOSEPH NJUGUNA MWAURA & 2 OTHERS vs. REPUBLIC**, Criminal App. No. 5 of 2008, that the offence of murder attracted only one sentence upon conviction, the learned Judge sentenced each of them to suffer death as by law provided.

The conviction and sentence aggrieved the six appellants who then appealed to this Court raising various grounds in their respective memoranda of appeal but which can be summarized that the learned Judge erred by;

- *Convicting the appellants on the basis of inconclusive circumstantial evidence*
- *Relying on the evidence of PW6 Robert Wambui without proper corroboration*
- *Basing her conclusions on the evidence of an accomplice in Peter Mungai (PW2)*
- *Relying on hearsay and speculation about the motive for the killing*
- *Convicting the appellants despite the contradictions and inconsistencies in the prosecution evidence*
- *Imposing death as a mandatory sentence when the same is unconstitutional.*

When we heard the appeal, learned counsel who appeared for the appellants were **Mr. G. Kamau** for the 1st; **Mr. Ratemo** for the 2nd, 3rd and 4th; **Mr. F.N. Njanja** for the 5th and **Mr. R. Mutitu** for the 6th, while **Mr. O'Mirera** the learned Senior Assistant Director of Public Prosecutions appeared for the respondent Republic.

Going first, **Mr. Gicheha** contended that PW2's evidence which led to the arrest of Kinyuru was worthless as it was from an accomplice and it was hearsay and amounted to a confession improperly taken. He added that as there was no eye witness to the killing who testified, the case was wholly circumstantial and not factual. The evidence that PW3 **Patrick Ngugi Mucheru** lent some money to Wanjiru who is Waithera's sister, did not prove that the two financed Macharia's murder as she borrowed the money for school fees. He faulted the evidence regarding recovery of the panga allegedly used as the killer weapon as inconsequential because no forensic examination was conducted to connect it to the crime and pangas are common tools in a rural setting. He questioned why **Mama Fiona** and **Njenga** the two people with whom Macharia left Wambui's house on that fateful day were not called to testify. Mr. Gicheha also assailed the evidence of **Robert Thiongo** (PW6) as unreliable and not corroborated. Moreover, all he heard was that someone was to be given medicine but there was no talk of death or elimination. Finally, counsel dismissed the investigations

as shoddy? and faulted the learned Judge for improperly rejecting Waithera's defence.

Next, **Mr. Ratemo** briefly submitted that the case was based on circumstantial evidence but the learned Judge failed to ensure that the chain of such evidence was complete before using it to convict his clients. To him, the investigations were not thorough and the evidence tendered "did not exclude every other possibility". Finally he urged that the sentence for murder need not have been death and so pleaded that we refer the matter to the trial court for resentencing.

Mr. Njanja also attacked the evidence of PW6 and requiring corroboration under **Section 124** of the **Evidence Act** and urged that the learned Judge's finding that PW1, 2, 4, 7 and 8 offered corroboration was erroneous because their evidence did not materially corroborate PW6. He next stated that as no „dawa? or poison was found in Macharia's body, PW 6's evidence was not corroborated by the death. He argued that the learned Judge was wrong to state that **Eliud Kimani Mwai** the 5th Appellant confessed to dumping Macharia's body when, from the evidence of PW7 APC Ngomoli, it is the 3rd appellant who had so confessed. Counsel faulted the learned Judge for disregarding his client's defence that he merely worked in Wanjiru's house and was not a co-conspirator. He dismissed the entire prosecution case as having been based on "suspicion, speculation and surmises."

Mr. Mutitu also stated that PW6's evidence ought to have been treated with caution but was not. It was wanting because the date of the conversation was not mentioned and no identification parade was conducted for the alleged conspirators. He criticized the learned Judge for stating that Mwangi was the financier of the murder yet there was no evidence that he gave anybody money for the commission of the offence. Moreover, counsel concluded, his client's defence was rejected for no reason.

Opposing those appeals, **Mr. O'Mirera** gave an account of the antecedents to the discovery of Macharia's body on 24th June 2004 after he had been missing for nearly a fortnight. He submitted that some of the appellants merely volunteered information and that did not amount to confessions improperly taken. He submitted that PW2 who harboured the fugitive Kinyuru before giving him up to the police was in no way an accomplice and his evidence was cogent. He also defended the learned Judge's treatment of PW6's evidence stating that the „dawa? conspirators had in mind was the disappearance of Macharia because he was troubling Mwangi. The circumstantial evidence was strong and sufficient and it provided corroboration to PW6's evidence as what befell Macharia was no coincidence. The Senior Assistant Director of Public Prosecutions contended that the finding of Macharia's wet jacket in Waithera's bathroom a couple of days after his disappearance called upon her to account for its missing owner, but she failed to do so. He urged that the learned Judge rightly invoked **Section 111** as read with **119** of the **Evidence Act** with regard to the appellants who disposed of the body as common sense dictated that they explain themselves in those circumstances. They failed to do so in their unsworn defences were properly rejected. On sentence, **Mr. O'Mirera** submitted that considering the heinous nature of the offence there were aggravating circumstances and the death penalty was deserved.

In reply **Mr. Gicheha** insisted, without mentioning them, that there were other hypotheses that could explain Macharia's death;

Mr. Ratemo that suspicion is not enough and the case ought to go back to the High Court for resentencing; **Mr. Njanja** that **Section 111** and **119** of the Evidence Act were inapplicable to the case but **25A** of the same should have been applied to the confession and that the jacket and the bicycle had nothing to do with his client and; finally, **Mr. Mutitu**, that PW6's claim that Mwangi used to beat his father was proof enough that he was not a credible witness.

We have given due consideration to those submissions and weighed them in light of all the evidence tendered on record which we have carefully and exhaustively evaluated and analyzed with a fresh and independent eye so as to draw our own inferences of fact. This is our bounden duty as a first appellate court proceeding by way of a rehearing although we do not have the advantage of hearing and observing the witnesses in live testimony. See **OKENO vs. REPUBLIC [1972] EA 32**; **ODONGO vs. REPUBLIC [2009] KLR**

261. Naturally, therefore, we accord the necessary respect to the findings of the trial Judge especially those turning on the credibility witnesses.

The first aspect of this case raised by all the appellants relates to the testimony of PW6. It is the case of the appellants that since he was a minor, his evidence should have been treated with caution and that corroboration should have been sought for it before it could be relied on for the conviction of the appellants. The record shows that when **PW6** testified on 11th July 2011 before Mwilu, J. (as she then was) he stated that he was 17 years old and in class 8, even though he could not specifically say when it is he was born.

The Judge though observing that he looked mature, nonetheless proceeded to order a *voir dire* on the basis that he was, by his own showing, aged 17 years old. At the end of it she ordered that he testify on oath as he understood the nature of an oath and the need to tell the truth. Did his testimony require to be corroborated? We respectfully do not think so. Even though he was but 9 years old when the events about which he testified occurred, we do not think that he was „a child of tender years? within the meaning and contemplation of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya. The relevant age is not that when an event to be testified about occurred, but that of the witness as at the time he gives his testimony because the issue that arises is the competency of the witness to testify. We do not think that being a minor or a child in the sense of being below the age of 18 years is the same as being a child of tender years.

Even though the Act does not define who a child of tender years is, it has long been the law in this country that it means a child of an age or apparent age of 14 years or below. That was the holding of the former Court in *KIBAGENY vs. REPUBLIC [1958]EA 92* which was cognizant and approving of the dictum of Lord Goddard, C.J in *REPUBLIC vs. CAMPELL [1956] 2 ALL ER. 272* that “*whether a child is of tender years is a matter of good sense of the court ...*” For purposes of reception we would uphold that to be the law notwithstanding the definition in the Children Act that states “*ten years or below*”, as the same is not in connection with testimonial competency. We have no doubt that whichever way one looks at it, PW6 was not a child of tender years and, accordingly, his evidence was not in need of corroboration. He should not even have been subjected to *voir dire* and we think that Mwilu, J acted *ex abundanti cautela*. That complaint by the appellants lacks merit and is therefore rejected.

The next aspect we shall address is the testimony of PW2 which is assailed as having been unbelievable for being either hearsay or untrustworthy for coming from an accomplice. There is not much to trouble us about hearsay. It was not, for the simple reason that PW2 testified, about a conversation he had with Kinyuru who was one of accused persons. He was not testifying to statements by a person not available. He himself was cross-examined on the truthfulness of his testimony and dangers sought to be mitigated by the rule against hearsay were not present. As to the claims that he was an accomplice, we are unable to see the basis for them. He was quite clear in his testimony and firm under cross-examination that Kinyuru came to his house at Mai Mahiu seeking refuge as he was on the run. He harboured him then, very properly and responsibly, reported to the police. He had nothing at all to do with the planning and execution of Macharia’s murder and cannot therefore by any stretch of the imagination be said to have been an accomplice. His testimony was properly received and did not require corroboration.

The main complaint raised by all the appellants was that the evidence tendered by the prosecution, which it is common ground was circumstantial in nature, did not suffice to establish their guilt beyond reasonable doubt. Evidence is circumstantial when it is indirect, calling for inferences from the nature of things as opposed to being direct when a witness testifies to what he saw, heard or felt regarding the man or principal fact. In the case before us, no single witness gave evidence to having seen anyone inflict upon Macharia that fatal cut that all but decapitated him. Rather, there was a chain of facts and circumstances, which, taken together, pointed to the appellants as the person involved in his death.

PW6, testified and the learned Judge accepted, that on two occasions meetings were held in the house of his employer Wanjiru (whom he referred to as „Mama Tabitha?). At those meeting were Wanjiru herself, her sister Waithera, her worker **Eliud Kimani** (5th Appellant) and her nephew, Waithera’s son, Mwangi. PW6 overheard the conversations in which it was clearly stated that a person who had been troubling Mwangi needed to be given „*dawa*” or medicine. He understood that the target for that solution being mooted was Macharia on account of the accounts of quarrels between him and his son Mwangi. The plotters were not comfortable with PW6 being around as they conversed and twice tried to get rid of him by sending him out. But he had heard them.

The circumstance of the planning of Macharia’s elimination was added weight to by the fact that Wanjiru used to tell her workers that Mwangi used to fight with his father Macharia. Those fights or, more correctly, beatings of Macharia by his own son were testified about by his brother **Githinji**, PW1. Not only did he confirm the beatings having been told by Macharia himself, he went further to explain the reason or cause of the disagreements and beatings, told him by Macharia, as follows;

“When I was told that David was missing, I knew he had been killed, as David and Anna Waithera were disagreeing. The disagreements stemmed from the demand by Anna Waithera, that David divides his property. David and I used to communicate. He used to tell me that Waithera used to incite the children to beat up their father. When they disagreed, the children or their mother would call the police, who would arrest David. That happened severally. The children were demanding property i.e. shamba, cows and food crops. They wanted everything to be sold and the proceeds divided among them. David’s arm was broken by his sons. His eldest son cut David’s hand with a panga. Those cases landed before court, but were resolved.”

There clearly was a pattern of violence. Waithera and Mwangi were impelled by hostile intentions and that testimony provides patent, if dark and selfish, motive for Macharia’s elimination. It is not necessary under our law to prove motive for murder since malice aforethought is defined in **Section 206** of the Penal Code in broad terms that do not include motive. Where it is proved to exist, however, especially in a case dependent on circumstantial evidence, it assumes great significance as this Court aptly put it in *LIBAMBULA vs. REPUBLIC [2003] KLR 683* cited by the learned Judge;

“Motive is an important element in the chain on presumptive proof and where a case rests purely on circumstantial evidence and may be drawn from facts though proof of it is not essential to prove a crime.”

Even though Waithera, Wanjiru and Mwangi did not participate in the actual killing of Macharia, there was evidence tendered that they planned and financed it and were present. Wanjiru borrowed money from her son in law PW3, and Kinyoru specifically told his host Munga

(PW2) that he, Njoroge, Mwangi and Chege and one other person were given money by Waithera and Wanjiru to kill Macharia. He repeated this on the day of his arrest even as he offered to show where the body had been dumped, which he did. He would not have known where to find it had he not been involved in its disposal.

Njoroge himself presented himself to the Investigating Officer on 25th June 2004 at the Chief's office at Kamae and mentioned Kinyoru and „Chege Bilali? as the persons who killed Macharia, limiting his role to that of ferrying the body to the place of disposal in the forest on his bicycle. He showed the police officers where the said bicycle was and it was produced in evidence.

Now, quite irrespective of what specific roles the appellants played in the planning and execution of the murder and the subsequent disposal of his body in the river, the evidence is quite clear that the appellants were all in it and they are irretrievably bound to each other in their fates as in their deeds by the doctrine or principle of common intention under **Section 21** of the Penal Code. Whether they were principal offenders or accessories thereto the legal consequences are exactly the same under **Section 20** of the same code. Thus it is that in law the planner, funder, executor, conveyor and concealer of a murder stands in exactly the same position as each of the others in that chain and is as fully guilty.

The additional circumstantial facts relate to the discovery of Macharia's newly-washed jacket at Waithera's bathroom with her explanation that she had washed it. She was in law in a position of special knowledge of the whereabouts or fate of the owner of that jacket under **Section 111** of the **Evidence Act**. Only she could explain where Macharia, who was last seen alive in that jacket at her home, was or what became of him. This added to the fact of the discovery of a panga hidden under the wooden floor of her bathroom were yet more inculpatory facts that pointed to her and her complicity in the death of her husband.

The law of circumstantial evidence is quite settled. In MWITA vs. REPUBLIC [2004] 2KLR 60 it was stated thus by this Court;

“It is trite that (sic) in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt; see Simon Musoke v Republic [1958] EA 715 where the following extract from Teper v R [1952] AC 480, 489, was quoted [1958] EA at page 719:-

„It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other c-existing circumstances which would weaken or destroy the inference?.”

The circumstantial evidence needs to form a chain so complete as to lead unerringly to the conclusion that the accused is guilty of the offence and that the said evidence is incapable of any other reasonable hypotheses than that of guilt. See also REX vs. KIPKERING ARAP KOSKE & ANOR [1949] 16 EACA 135; SANE vs. REPUBLIC [2007] KLR and ODONGO vs. REPUBLIC [2009] KLR 261.

Given the circumstantial evidence that was adduced before the trial court, we do not see that it leaves any doubt as to the guilt of all the appellants. The evidence was cogent, the witnesses credible and on the whole the case was iron clad. That there was no eye witness to the actual killing is of no moment. A man does not vanish from his own home only to surface dead at the bottom of a waterfall with his neck cleanly cut and wrapped in blankets and stuffed in sacks with heavy stones around them without the involvement of persons intent on dispatching him to the next world. In the present case those people were the appellants. It was circumstantial evidence alright, but as was stated long ago in REPUBLIC vs. TAYLOR WEAVER & DONOVAN [1928] 21 Criminal App. R 20;

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which the intensified examination is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

The unquestionable and conclusive answer to the mathematical equation of Macharia's murder is that it was the handiwork of the appellants. Their unsworn defences were no more than bare denials property rejected. They were correctly and safely convicted on sound evidence and their appeal against the same is devoid of merit.

As to the sentence of death imposed, we note that it was based on the learned Judge's application of the MWAURA (supra) decision to the effect that the death sentence is mandatory for the offence of murder. That decision was binding upon the learned Judge and she cannot be faulted for having followed it. We are now guided by the Supreme Court's decision in FRANCIS KARIOKO MURUATETU & ANOR vs. REPUBLIC [2017] eKLR that MWAURA is no longer good law and that a mandatory sentence of death is unconstitutional. That is not to say tht there are no instances when the sentence is merited.

From the record, extensive mitigation was offered for each of the appellants by their counsel then on record. They each expressed remorse or spoke of how they were first offenders and some were ailing. The irony of it may have been lost to

counsel but Waithera's mitigation commenced with *“she is 56 years old, a widow with 4 children ..the 7th accused [MWANGI] is her 2nd born son. She prays for non-custodial sentence.”*

We think, with respect, that it was cynical of Waithera and her counsel to seek sympathy from the court on account of her unfamiliar status of a widow when she brought it upon herself. We have also given full consideration to the mitigation offered for each of the appellants. Other than proceeding from the premise that there was no alternative sentence before she imposed the sentence of death, we do not see how the learned Judge can be said to have erred. Because the full mitigation is on record we do not accede to the request that the file be remitted to the High Court for a sentence re-hearing.

What we have in this case is a prime example of extreme depravity. That Waithera and Wanjiru should have chosen the path of elimination to settle the former's jealousy-fueled fury and disaffection with Macharia's taking of a second wife shows them to be of strange sisterly stock. That Mwangi should, after all the humiliation and beatings he had previously subjected his father to, now join his mother to plot and procure his death shocks the conscience with its chilling brutality. All the other appellants actively participated in the heinous act and there is no saving grace on their conduct.

Unless courts stand firmly against offences such as happened herein, they will be contributing to the descent of humanity into the dark pit of hellish degradation. When marriage and family become a mortal peril for spouses, and children kill their parents without blinking, something of our humanity is lost and the law must be deployed and enforced to express our collective horror, revulsion and outrage. The perpetrators of such acts must not be allowed to breathe in the air of liberty and must never roam freely among the happy and the free who respect the lives of others and to whom filial bonds still matter. It is for such cold-hearted killers that the penalty of death was legislated and for whom the courts must declare it. The same was properly imposed and we have no reason to disturb it. We confirm and uphold it.

The appeals by all the appellants are without merit and are **accordingly dismissed.**

Dated and delivered at Nairobi this 8th day of February, 2019.

P. N. WAKI

.....

JUDGE OF APPEAL

R. N. NAMBUYE

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR