REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

(CORAM: MAKHANDIA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 76 OF 2015

BETWEEN

PATRICK DANIEL LESADALA…….…. APPELLANT

AND

REPUBLIC……RESPONDENT

*(Being an appeal against Conviction and Sentence arising from the High Court of Kenya at Nairobi (**F. Ochieng', J.**) dated 19th June, 2013*

in

H. C. Cr. Case No. 77 of 2005)

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JUDGMENT OF THE COURT

On 4th August 2005, **Patrick Daniel Lesadala** "*the appellant*" was arraigned before the High Court sitting in Nairobi charged with the offence of murder. The information laid was that on 3rd April 2005 at Zimmerman Estate in Nairobi, he murdered **Dianah Karambu Nthiba** "the deceased". The prosecution called 17 witnesses in a bid to prove its case against the appellant.

In summary the prosecution case was that on 3rd April 2005 at about 8.15 a.m. **Sgt John Onyango Zadock**, (PW2) was in a bar he operated at Kamiti Maximum Security Prison taking stock when the appellant arrived. The appellant was a prison warder at the said institution. The appellant exclaimed "**I have killed**". When asked by the witness what he had killed, he told him that he had killed a woman. The appellant then wiped out a pistol and placed it on the table with 5 spent cartridges and 5 live rounds. He then asked for a beer. The witness took the pistol and all the cartridges and put them in a polythene paper. He thereafter contacted **SS Mwangangi**, (PW7) the Deputy in-Charge at the prison who came and to whom he surrendered the pistol and ammunition. When PW7 asked the appellant what had transpired, the appellant informed him that he had shot a woman at Zimmerman Estate. PW7, accompanied by this witness and other officers as well as the appellant, visited the scene of the shooting where they found the body of the deceased covered in blood.

In the meantime, **James Koila Kipkoech** (PW1) was on the material day between 7.00 am and 7.30 am manning the prison's armoury when the appellant came and requested him to issue him with a pistol and 10 rounds of ammunition, ostensibly that he was on a special assignment to find and arrest an escaped prisoner, **Landry Sironga** who was deemed hostile and dangerous. PW1 acceded to the request. Later in the day at around 8.30am, he met the appellant at the canteen as he gave the pistol with 5 live rounds of ammunition and 5 spent ones to PW2.

The events that happened after the appellant was issued with the pistol and ammunition, and when he returned to the canteen and surrendered the same, are best captured through the testimony of PW5 and PW6. PW5 was the deceased's son and was about 12 years old at the time, living with the deceased at Zimmerman estate. On the night of 2nd April 2005, the appellant, whom he had known for about a year and was a boyfriend to the deceased came to their house and spent the night. The deceased did not return home that night. The following morning, the appellant woke up early and gave the witness shs.50/- for breakfast before leaving the house at around 6.30 am. The deceased arrived at their house later at around 7.00 am and prepared breakfast.

The appellant returned to the house and found the deceased washing clothes outside and asked her where she had spent the night. She responded that she had spent the night at her uncle's place in Dagoretti. The appellant then told the deceased to go into the house and call the said uncle to confirm whether indeed she had spent the night at his place. The appellant and the deceased went into the bedroom and immediately a quarrel ensued. The appellant threatened to kill the deceased if her story did not check out. It was then that the witness suddenly heard a burst of gunshots and heard his mother scream that she was being killed. He opened the door, peeped and ran away. As he

ran, he heard two more shots ring out. He went and stood at the gate and saw the appellant come out of the house. He was still holding the gun. The appellant went back into the house again, and it was then that PW5 ran to his auntie's house, one **Mary Igoki Kiarani** (PW10), who lived in the same estate. On hearing what PW5 told her, PW10 reported the matter to Kasarani Police Station. Later when the police arrived, the witness volunteered to take them to where the appellant lived but before proceeding, the police received information the appellant was at the prison canteen where they found him.

PW5's testimony was collaborated by that of **Leview Njagi Peter** (PW6). His house was adjacent to that of the deceased. On the material day, whilst inside his house, he heard the appellant and the deceased quarrelling. He had known the appellant for a while and was familiar with his voice. He heard the appellant demanding to know from the deceased where she had spent the previous night. When the deceased told her that she had spent the night at Dagoretti, the appellant began hurling insults at her calling her a prostitute. Shortly thereafter, he heard sounds of what he described as sounds of timber banging very hard. After a while, he saw the appellant leave. He then entered the house of the deceased where he found her lying in bed and bleeding from the chest and lower part of her torso. He had earlier seen the appellant holding a small black pistol.

Dr. Moses Njue Gachoki (PW11), a forensic pathologist conducted the autopsy on the deceased's body and concluded that the deceased died as a result of a chest injury from gunshot wounds. A bullet was recovered from the deceased's body.

Alex Ndidi Mwandawiro (PW8), a firearms examiner, after carrying out a forensic ballistics examination of the pistol concluded that the deceased was felled by bullets from the pistol issued to the appellant.

PW10 was related to the deceased through marriage. The deceased was her husband's cousin. The deceased had confided to her that she and the appellant were having problems in their relationship. On the material day, when PW5 informed her that the appellant was fighting the deceased inside the bedroom, she rushed to the scene only to find the deceased in the bedroom with blood all over her chest.

SSGT Kiprono Koshom, (**PW12**) the in charge of discipline at Kamiti Medium Prison went to PW2's bar on the fateful morning and found the appellant drinking. After a few minutes the appellant took out a pistol and handed it over to PW2. Thereafter, PW7 was contacted, he came over and formally received the pistol and the ammunitions. They then proceeded to the scene of crime in the company of the police officers from Kasarani Police station and collected the body of the deceased and proceeded to Kasarani Police Station. Earlier, the appellant had confided to the witness that he had killed his girlfriend. As far as he was concerned, the appellant was off-duty on the material day. Therefore, the appellant ought not to have been given a pistol and ammunition on that day.

After these witnesses testified, the learned trial Judge, Ojwang, J. (as he then was) discharged the assessors. He did so following the amendment of the law by **Act No. 7 of 2007** which removed the provisions that required trials in specified kinds of cases to proceed in the presence of assessors. Thereafter, **John Mutethia Rimberia** (**PW13**) testified in the absence of the assessors. A little while after that, this Court in the case of **Moses Ndwiga Njagi v Republic [2007] eKLR** made it clear that notwithstanding the amendment of the law on assessors, all the trials which had commenced with the help of assessors, ought to be completed in the presence of the said assessors. It was then that the trial court directed that the evidence which was tendered by PW13 in the absence of the assessors, be expunged from record.

John Mutethya Rimberia (PW13), was recalled and testified in the presence of assessors. He stated that when a prisoner escapes from prison custody, the Prison Officer who is in charge notifies the Officer Commanding Station (OCS) at the nearest police station. He also notifies the Commissioner of Prisons and the Provincial Prisons Commander. If the escaped prisoner is not apprehended within 24 hours, the Prison Service hands over the matter to police. In effect, it is the police who thereafter continue to search for the escaped prisoner. He was aware that a prisoner named LANDRY SIRONGA had escaped on 27th September 2002 at about 12.00 noon. He also testified that the duty roster maintained at Kamiti Prison showed that on 3rd April 2005, the appellant was off duty. According to the witness, the appellant had not been assigned the duty to track down and arrest the escaped prisoner aforesaid. He had been assigned guard duties instead.

SP Peter Mwanzo Nyagah (**PW16**), was a police officer attached to the Kasarani Police Station at the material time. He was on duty at the station on the morning of 3rd April 2005 when he received a report of a murder from PW10. He proceeded to the scene and found the deceased's body and noted that the body had 4 bullet wounds. He immediately commenced investigations, which disclosed that the deceased was shot dead in full view of her son, PW5. The son to the deceased identified to him the appellant as the person who had shot dead his mother.

CPL Maxwell Otieno (PW17), a CID Officer based at Kasarani also investigated the case. Investigations disclosed that the appellant was off-duty on 3rd April 2005. However, the appellant persuaded PW1 to give him a pistol plus 10 rounds of ammunition on the grounds that he was going out for special duties that involved the apprehension of an escaped prisoner, but which was a lie. PW17 also learnt from PW5 that he witnessed the appellant shooting the deceased. Having finalized the investigations, PW17 was convinced that the appellant had committed the offence of murder. That is what informed his decision to prefer the murder charge against the appellant.

With this evidence, the appellant was found with a case to answer. He opted to give an unsworn statement of defence and called one witness. He stated that on 2nd April 2005 he received a phone call from his boss informing him of an escaped prisoner who had been sighted at Githurai 45/Kasarani and was instructed to help apprehend the escapee. He spent the night at the deceased's house but the deceased did not return to the house. On the morning of 3rd April 2005, he gave PW5 money for his breakfast and proceeded to the armoury at Kamiti, where he was given a pistol and 10 rounds of ammunition. As he proceeded to Githurai on the assignment, he decided to pass through the house of the deceased to have breakfast. Upon reaching the house, he found the deceased inside her bedroom with another man. Shocked, he asked the deceased what was going on but she did not answer. The man then told the appellant that he could do nothing. He got up and threw a punch at the appellant, which he blocked. The man caused the appellant to fall down and his pistol fell from his waist. The man picked the pistol and a struggle ensued. As they struggled, the man held the trigger causing several bullets to discharge. When the gun stopped discharging the bullets, the unidentified man left the bedroom. The appellant tried to follow him but lost him in the estate. When he returned to the house, he found the pistol on the floor and the deceased bleeding profusely. He picked the pistol and went to look for a taxi but a crowd gathered and wanted to lynch him. It is then that he fled the scene fearing for his life. He went to Kamiti where he was found. The appellant denied telling PW2 that he had killed somebody. He asserted that he could not have killed the deceased as they were lovers.

His witness, **Nathan Jeremiah (DW2**) testified that on the night of 2nd April 2005 he was at Jambo club where he remained until 7.00 a.m. At the request of one of his friends, he drove 2 ladies and the friend to Zimmerman Estate. One of the ladies was the deceased. DW2 had known of the relationship between the appellant and the deceased. According to DW2, he offered to be a witness but the DCIO told him that he would not, as he had actually not witnessed the incident in which the deceased met her death.

The trial court was not all convinced by the appellant's defence. It chose to believe the prosecution case instead. Accordingly, the appellant was convicted for the offence and sentenced to suffer death. Dissatisfied with the outcome, the appellant lodged the instant appeal challenging the conviction and sentence. The grounds of appeal revolved around the violation of the Constitution, contravention of section 200, 201, 262 and 263 of the Criminal Procedure Code (CPC), failure to prove malice aforethought, over reliance on the evidence of a minor that was not sworn, the information not being proved to the required standard, failure to consider the defence put forth by the appellant, and lastly, the sentence imposed being manifestly harsh and excessive.

In the submissions on behalf of the appellant, **Professor Nandwa,** learned counsel contended that the prosecution failed to bring out a nexus between the appellant and the offence and asserted that the appellant's conviction was based on mere suspicion. It was submitted further that the appellant's rights under Sections **72** through 84 of the former Constitution and under Articles 25, 49 and 50 of the current Constitution were violated. The appellant's trial commenced under the former Constitution's era but spilled over to the current Constitution. It was alleged that the appellant spent 114 days in remand without formally being charged and without any reasonable explanation being proffered for the delay. That as a result, his rights were contravened under the former Constitution which required an accused person to be arraigned in court before the expiry of 14 days. It was submitted further, that failure to arraign the appellant in court within the stipulated period rendered the whole trial process unfair and a nullity in law. The cases of **Murunga v Republic; Ann Njogu & 5 Others v R; Ndede v R (1991) KLR 567; Albanus Mutua Muasya v R** were cited for that proposition. It was submitted that the right to a fair trial begun from the arrest of the accused person to conviction.

It was the appellant's submssion that his trial was conducted in contravention of sections **200** and **201** of the Criminal Procedure Code (CPC). It was submitted that when Ochieng' J. took over the case from Ojwang' J., he did not discharge his duty to the appellant of informing him of his right to have witnesses who had earlier testified recalled and reheard. According to the appellant, failure to do so rendered the trial a mistrial as the provisions were couched in mandatory terms. In the circumstances, the appellant sought to be acquitted as a fresh trial could not be conducted without infringing on his rights once more.

The appellant also challenged his prosecution on the ground that his trial proceeded without assessors during the period when sections **262** and **263** of the CPC stipulated that all murder trials in the High Court be held with the aid of three assessors. Though initially the trial commenced with the assessors, the trial judge (Ojwang, J) in the course of the proceedings discharged them on grounds that the Statute Law (Miscellaneous Amendments) Act No. 7 of 2007 had on 10th October 2007 come into force and had done away with the need for assessors in murder trials. The appellant relied on the case of **Moses Ndwiga Njagi v Republic (2007) eKLR** for the contention that a trial that continues without assessors or with less than the stipulated number of assessors was unlawful. The appellant alleged that the trial in the

High Court proceeded with only two assessors, at times whose names were never recorded, making it difficult to know whether they were present during the hearing.

It was further the appellant's contention that the prosecution failed to establish malice aforethought. It was claimed that no cogent, plausible or reasonable explanation was advanced to prove a viable reason constituting malice aforethought. That the appellant telling some of the witnesses that he had killed the deceased could not amount to a confession in law and ought to be treated as hearsay evidence. It was asserted that the reason or the intention of the appellant's taking a firearm from the armoury was to attend to special duty or assignment. In the circumstances, it was submitted that the intention to kill on the appellant's part was a subjective test and needed to be demonstrated beyond reasonable doubt.

The appellant further took issue with the testimony of PW5. According to the appellant, much weight was accorded to the said testimony though the evidence was not taken under oath. He relied on Section 151 of the **CPC** for his submission. The provision requires that evidence relied on should be obtained under oath. The appellant pointed out that though the court remarked that the evidence of PW5 was only for purposes of helping it understand the case, but in its determination the court placed premium on the fact that PW5 had stated that he witnessed the appellant shoot the deceased. He submitted that he was never accorded an opportunity to cross-examine the witness leading to a violation of his rights.

The appellant further submitted that the crime scene was not preserved for forensic examination and evidence gathering to rule out the possibility of a third party at the scene, who might have caused the death of the deceased. It was further submitted that critical witnesses like one Mr. Bernard Karuri, who gave the appellant instructions to help in apprehending an alleged escapee was not called to testify. It was submitted that failure to avail such a witness was intentional since his evidence would have been adverse to the prosecution's case.

The appellant denied that the case was proved beyond reasonable doubt. The prosecution was accused of relying on conjectures, speculations and or mere suspicion rather than on cogent evidence to advance its case. The authority of **Robert Mwadime Maghanga v Republic (2016) eKLR** was cited to buttress the appellant's position that the more serious a charge, the heavier the burden of proof on the prosecution. Since the appellant denied that there was any credible evidence tendered, counsel opined that before relying on the circumstantial evidence and drawing an inference of guilt on the part of the appellant, the court ought to be sure that there were no other co-existing circumstances which would weaken or destroy the inference. He cited the cases of **Joan Jebiichii Sawe v R (2003) eKLR** and **Neema Mwandoro Ndurya v Republic, Criminal Appeal No. 446 of 2007** in support of this proposal.

The appellant also contended that his defence was never given due consideration. He asserted that his defence was pragmatic, it stood the test of time and law and that the same was not rebutted by the prosecution. The appellant urged that the facts of this case did not amount to murder but to manslaughter. But again, even if the same amounted to murder, counsel argued, then the sentence of death imposed was manifestly excessive, unwarranted and harsh in light of the decision of **Francis Karioko Muruatetu & Another v Republic (2017) eKLR** by the Supreme Court. The appellant had been incarcerated for a period totalling about 14 years which was sufficient punishment in the

circumstances. Counsel therefore urged the sentence of death imposed be reviewed, set aside and/or be varied.

Ms. Wang'ele, learned Senior Principal Prosecution counsel opposed the appeal and supported the appellant's conviction and sentence. She contended that the conviction was based on sound and direct evidence. In reply to the submission that the appellant was charged after a long delay in police custody, counsel stated that the reason given was that PW5 had to recover from the trauma of seeing his mother shot and killed. According to counsel, even if a violation of the appellant's right to be taken to court within a reasonable time had been violated, then the appellant's remedy lay in damages as held by the High Court. Contrary to the assertions made that section 200 of the CPC was not complied, counsel submitted that the appellant was informed of his right to recall witness but chose not to exercise that right. Counsel contended that the defence understood the options it had under section 211 of the CPC and there was, in any event, no prejudice occasioned to the appellant who was represented by counsel.

On malice aforethought, counsel submitted that it could be construed from the conduct of the appellant, that the appellant went to the armoury and lied to the officer

in charge in order to get a pistol and ammunition. He then proceeded to the deceased's house and shot her. He then went back to Kamiti and proclaimed to having killed the woman and drunk beer(s). In counsel's view and contrary to assertions made by the appellant, there was manifest malice aforethought.

This is a first appeal. Our mandate therefore is to appraise, re-assess and re-analyse the evidence on record so as to arrive at our own conclusions. We are also reminded that we should be slow in interfering with findings of fact by the trial court unless we are satisfied that it was not based on evidence, or based on a misapprehension of the evidence, or the judge had been shown demonstrably to have acted on wrong principle in reaching the finding. See **Okeno vs Republic [1972] LP 32** and **Mwangi v Republic [2006] 2 KLR 28.**

To our mind, these are the issued for determination in this appeal;

(i) Whether or not the appellant's constitutional rights to a fair trial were violated;

(ii) Whether or not the appellant was prejudiced by the trial proceeding partly without assessors or with less number of assessors;

(iii) Whether section 200 of the CPC was complied with;

(iv) Whether malice aforethought on the appellant's part was established;

(v) Whether the court placed too much reliance on PW5 evidence which was not sworn; and

(vi) Whether the case was proved to the required standard.

The appellant has complained that his fundamental rights to fair trial were violated. The basis of the complaint is that he was held in police custody, before being arraigned in court for a period of 114 days. The appellant has contended that no reasonable explanation was proffered for the delay. The delay was therefore in contravention of section 72 (3) of the former Constitution of Kenya which required an accused person to be presented in court before the expiry of fourteen (14) days following his arrest on a capital charge. The appellant cited the authorities of **Ann Njogu & 5 others V Republic, Misc. Cr. App. No. 551 of 2007** and **Albanus Mwasia Mutua V Republic (2006) eKLR** in which it was held that an accused's person constitutional rights under section 72 (3) were violated upon an accused person being kept in police custody without being charged before a court for more than the stipulated period. Unless the delay was explained, the authorities were to the effect that an accused person was entitled to an acquittal, notwithstanding the weight or strength of the prosecution case.

To explain the delay, the prosecution through an affidavit sworn by the investigating officer contended that PW5, a key witness, needed time to heal from the trauma suffered by him seeing his mother being shot and killed. PW16, the investigating officer, felt it necessary to have PW5 fully recover before what he had stated could be counterchecked. That when he questioned the witness later, PW5 did not record another statement as he repeated what he had said. The appellant countered those assertions that PW5 only recorded one statement and that was on the day of the

incident. Those assertions are simply not sufficient to dislodge the prosecution's explanation that PW5 was traumatized from the whole ordeal and needed time to recover. PW5 was about 12 years old living in his mother's house. On the material day, he saw the mother being shot and her life cut short. No doubt he was traumatized. His life had obviously been altered forever and the reality of growing up without the love and care of his then guardian angel must have hit him hard. It might well be that the boy needed time to recover before facing the rigours of a trial in such circumstances. Given the foregoing, we are satisfied, just like the trial court, that the appellant was taken to court as soon as was reasonably practicable.

In any event, the issue was raised before Ojwang, J and extensive submissions made on the same. In a lengthy ruling, the learned judge rendered himself thus;

> **"I have considered the specific facts of the Criminal case in question; the work so far undertaken by the court; the contention made by the accused, the explanation for delay in arraignment of the accused, given by the prosecution and I have come to the conclusion that the prayer for termination of the trial lacks a proper foundation in law. The facts and circumstances in place, too render it inappropriate to terminate the trial and to prematurely acquit the applicant herein…"**

We see no need to depart or interfere with this conclusion. The judge was satisfied with the explanation given by the prosecution with regard

to the delay. The prosecution need only to explain to the satisfaction of the court the reasons behind the delay. The prosecution acquitted themselves very well before the trial court in this regard.

Moreover, the appellant's relief with regard to this violation is no longer an acquittal. Courts have since held that where there is such a violation, an accused's remedy lies in compensation by way of damages against the State. For instance, in **Julius Kamau Mbugua v Republic (2010) eKLR** the Court of Appeal observed that a violation of the constitutional provision stipulating the time within which an accused must be produced in court does not give rise to an automatic acquittal since such an accused person could be adequately compensated by way of monetary damages.

The appellant has also raised the issue that his trial partly proceeded without assessors or with less number of assessors required. Before **Statute Law (Miscellaneous Amendments) Act No. 7 of 2007** was enacted**,** it was a mandatory requirement under sections **262** and **263** of the CPC for murder trials in the High Court to be conducted with the aid of three assessors. When the law was amended doing away with the need for assessors, the appellant's trial in the High Court was underway. The trial Judge dispensed with the assessors pursuant to the said amendment. Thereafter, this Court ruled that notwithstanding the amendment of the law on assessors, all trials which had commenced with the aid of assessors were to be concluded in their presence. See **Moses Ndwiga Njagi v Republic (supra)**. The trial court in compliance with the aforesaid decision, expunged from the record the evidence of PW13 which had been taken in the absence of assessors. The witness was subsequently recalled and testified in the presence of assessors.

The appellant has also pointed out that the court record reflects that the trial proceeded from 5th October 2011 without assessors and thereafter, proceeded with only two assessors contrary to the law. This submission is not supported by the record at all. The record shows that from the date aforesaid to the conclusion of the trial, the trial judge always ordered for the assessors to be paid their allowances for the day. The Judge could not have made such orders if the assessors had been absent during the proceedings. As regards the names of the assessors, the record once again shows that on 18th May 2011, the 3rd assessor, Robert Mwangi's presence was dispensed with as he was said to be away on official duties. Thereafter, the case proceeded to conclusion with two assessors. Counsel for the appellant did not raise any objection regarding the order to dispense with 3rd assessor. If anything he is recorded as saying "**no objection**". There was nothing unlawful with proceeding with two assessors, after Robert Mwangi had fallen out. Indeed, section 294 of the Criminal Procedure Code envisages such a situation. In **Cherere Gikuhi v R [1954] 21** EACA 304, the predecessor of this Court held:

> **"(1) A trial which has begun with prescribed number of assessors and continues with less than that number is unlawful unless the case can be brought precisely within section 294 of the Criminal Procedure Code.**
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> **(2) To be within section 294 aforesaid, one of the two conditions must be satisfied, viz, either that the absent assessor is 'for any sufficient cause prevented from attending throughout the trial' or that he absents himself and it is not practicable immediately to enforce his attendance…"**

It must have been any of the above reasons that informed the court's decision to dispense with the 3rd assessor. The trial court was thus perfectly in order to do away with the participation of the 3rd assessor. It acted within the law. In any case, no prejudice was occasioned to the appellant by doing away with one assessor. The assessors returned a guilty verdict against the appellant. However, the Judge cognizant that he was not bound to accept the verdict by the assessors went ahead to weigh and consider the evidence tendered and arrived at his conclusion which was the same as the two assessors.

It is further the appellant's submission that his trial failed to abide with section 200 of the CPC. The complaint that when Ochieng', J took over the conduct of the trial from Ojwang J., the former failed to inform the appellant of his statutory right to have witnesses who had testified recalled. This is denied by the respondent. The record indeed shows that on 17th February 2009, it was explained to the appellant that it was his right to demand all or any of the witnesses who had testified to be recalled to testify afresh. Asked whether he wished to exercise the right, the accused, through his counsel stated and informed court that he did not wish to have any witnesses recalled. The case of **Rebecca Murikali Nabutora vs. Republic, Miscellaneous Criminal Appeal No. 445 and 452 of 2012** relied on by the appellant with regard to this issue, is clearly distinguishable on the facts obtaining in this case.

The appellant has before this Court denied that malice aforethought as a key component for the offence of murder was proved to found a conviction. The appellant's case is that no cogent, plausible or reasonable explanation was advanced to prove a viable reason constituting malice aforethought. He contends that his intention of taking firearm from the armoury was to attend special duty, that is, to arrest prison escapee Landry Sironga. We concur with counsel for the respondent who during the hearing submitted that malice aforethought could be construed from the conduct of the accused. Assuming the appellant had indeed been assigned special duties which required the firearm and extra ammunition, then let us consider his conduct on the material day. PW5 gave evidence that the appellant came to the house the previous night. At some point the appellant left the deceased's house but returned later at around 11pm. The deceased had not come back and the appellant enquired about her whereabouts. Early the following morning, the appellant told PW5 that he was going to Kamiti but would be back later. The appellant went to the armoury at around 7.00am and was issued with the firearm and the ammunition. After being issued with the firearm and ammunition, the appellant did not proceed to Kasarani to look for the purported escapee, instead he went back to the house of the deceased. Upon arrival, he found the deceased washing clothes and a quarrel ensued. The basis of the quarrel was where the deceased had spent the previous night. The appellant threatened the deceased that if her story did not check out, he would kill her. This evidence is collaborated by that of PW6 who heard the appellant quarrelling with the deceased as well, demanding to know where she had spent the night and calling her a prostitute. He even threatened to part with her completely. Moments later, the two heard gunshots. The appellant then left the house and went to Kamiti and handed the pistol to PW2. PW4 stated that when he met the appellant at the canteen on the morning of the material day, he stated that he had shot a woman and thus accomplished his mission which he did not clarify. He did not state that he had shot an escaped prisoner and if anything he was having a beer. From the events, it is clear that the appellant had been incensed greatly by the deceased failing to spend the night at her house. No doubt feeling jilted, the appellant proceeded to the armoury to get a firearm in order to commit the ghastly act.

The evidence of the escaped prisoner was also carefully analysed by the learned trial Judge who found that the purported prisoner, Landry Sironga had escaped from prison in the year 2002. That in accordance with the Prison Service Procedures, prison officers only had

jurisdiction to search for an escaped prisoner on their own within the first 24 hours of the escape. That thereafter, they could only do so in the company of police officers. Those assertions were never controverted. The so called special mission, in our view, was a ruse created and sold by the appellant to the armoury officer in order to be given the firearm and extra ammunitions for the mission he hatched and subsequently accomplished, the killing of the deceased. He pumped four bullets in the body of the deceased. The intention was not to maim the deceased but to fatally injure her. There can be no other manifestation of malice aforethought than this.

There was the apprehension by the appellant that the High Court placed much reliance on the testimony of PW5 in arriving at its verdict despite the fact that PW5 was allegedly not sworn or cross-examined on his evidence. In our view, the apprehension is misplaced. The record reflects that after PW5 testified, the court was cognizant of the need for its dependency on other collaborative evidence to arrive at a conviction or otherwise. The court remarked as follows;

> "**Since PW5 was not sworn and was basically helping the court the weight to be attached to his evidence is much dependant on other evidence**." (Emphasis put)

It is also not true that the appellant was not afforded an opportunity to cross-examine PW5. After being stood down, the court gave counsel for the appellant a chance to cross-examine the boy the following day. The Judge stated;

> "**I have, however, allowed counsel for the accused, Mr. Mwaura to share on any issues he might find the young man to shed light on. And tomorrow 3/5/06 Mr. Ondari can facilitate any relevant point being raised, and the boy may answer. He is in good condition and he is as far as I can see a sincere witness. I have taken into account those points allowing any essential point to be placed before him tomorrow; the court will ensure that any such query is raised in the best and the most friendly manner."**

The following day, the court recorded that that PW5 was not sworn since the court was not convinced that he understood the nature of the oath. However, the then counsel for the appellant, Mr. Mwaura informed court that he was ready to proceed and thereafter the record reflects counsel's cross-examination of the witnesses. The credibility and veracity of PW5 testimony was therefore tested. In **H O W v Republic (2014) eKLR,** the High Court was faulted for failing to ask the accused to cross-examine a prosecution witness who was a child below 12 years if he wished to do so.

This Court considered it a serious lapse because the accused's conviction was based on that evidence in the main. However, that position does not obtain in the present case since the appellant was duly accorded his right to cross examine PW5 as provided in section **208** of the CPC.

Taken in totality the evidence clearly points to the appellant's guilt. His defence that he found the deceased with another man cannot stand in light of PW5 statement that there was no one else in their house on the material morning. The appellant stated that he ran after the mysterious man after the shooting but he lost him. There was no report by any witness or person of the other man escaping after the gunshots. PW5 and PW6 both saw the appellant holding the gun after the shooting. He did not call for help or attempt to help the deceased who was bleeding to death. He returned to his work place where he told his colleagues he had killed a woman as he sipped beer. He did not even attempt to save the life of the deceased by rushing her to hospital, if his defence was to believed. In our view, that is not the conduct of an innocent person. On the whole the evidence both direct and circumstantial pointed to the appellant as the perpetrator of the crime. We have no doubt that the evidence tendered was sufficient to convict the appellant and the defence advanced by the appellant was rightly rejected by the trial court.

On sentence, we note that the appellant was allowed to mitigate. The court took into account the mitigation proffered. The court also considered the pronouncement by this Court in **Godfrey Ngotho Mutiso v Republic, Criminal Appeal No. 17 of 2008** regarding the mandatory nature or lack of it, of the death sentence. The Court then came to the conclusion that the offence was committed with pre-meditation and the appropriate sentence was the death penalty. Given the grisly, ghastly and callous nature and manner in which the appellant committed the offence, and right in the face of the deceased's 12 years old son, the death penalty was merited and we see no need to interfere with it.

The appeal is accordingly dismissed in its entirety.

Dated and delivered at Nairobi this 24th day of May, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR