



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NYERI**  
**(CORAM: O’KUBASU, WAKI & AGANYANYA, J.J.A.)**  
**CRIMINAL APPEAL NO. 125 OF 2008**

**BETWEEN**

**STANLEY KAMAIRO ETHANGATHA.....APPELLANT**  
**AND**  
**REPUBLIC.....RESPONDENT**

*(Appeal from the conviction and sentence of the High Court of Kenya at Nyeri (Lenaola, J.)*

*dated 28<sup>th</sup> January, 2008*

**in**

**H.C.CR.C. NO 121 OF 2003)**  
**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This appeal has a long and rather unfortunate history in that the incident giving rise to the appellant’s arrest and subsequent arraignment in court is alleged to have taken place in the last century, more specifically on 8<sup>th</sup> October, 1991!

**STANLEY KAMAIRO ETHANGATHA**, the appellant herein, was arraigned before the superior court on an information in which he was charged with two counts of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offences were as follows:-

**COUNT 1**

**“STANLEY KAMAIRO ETHANGATHA: On the 8<sup>th</sup> day of October, 1991, at Akirang’ ondu location in Meru North District within Eastern Province, murdered EDWARD KOOME.”**

**COUNT II**

**“STANLEY KAMAIRO ETHANGATHA: On the 8<sup>th</sup> day of October, 1991, at Akirang’ ondu location in Meru North District within Eastern Province, murdered ISIAH ETHANGATHA.”**

It has to be pointed out that according to the evidence accepted by the superior court after the incident the

appellant disappeared from his home area for a period of eleven years and that after his arrest he underwent the then Committal proceedings before he was formally charged before the High Court at Meru on 4<sup>th</sup> September, 2003.

The trial of the appellant commenced on 16<sup>th</sup> May, 2006 before Lenaola J. with the aid of three assessors (as the law then provided). What was the evidence placed before the trial court? The prosecution called a total of seven witnesses.

**Joel Kainga (PW1)** testified that on 8<sup>th</sup> October, 1991 at about 4:00 p.m. he was ploughing Kaberia's land with Nkinang and Murithali when the appellant came and requested Joel and his colleagues to go and plough his land too. Joel asked the appellant to wait and after an hour they all went to the appellant's land. As the group walked back, the appellant started quarreling with his father Ethangata and nephew Koome. The quarrel was over a cow which the appellant had allegedly given to his in-laws but the father had gone to reclaim it. It was the evidence of Joel that he saw the appellant cut Koome on the head. On seeing that, Joel ran away but when he went back to the scene he found that Koome and the appellant's father were dead. From that day Joel never saw the appellant again until that day he was giving evidence i.e. 16<sup>th</sup> May, 2006.

**Moses Ntongai M'Miriti (PW2)** testified that on the material day (8<sup>th</sup> October, 1991) at about 2:00 p.m., he was sent by **James Mutia (PW4)** to take some miraa to the deceased, Ethangata. Moses took miraa to Ethangata who was grazing his animals. Ethangata sent Moses to collect firewood and as Moses was coming back he heard Ethangata screaming. Moses rushed to answer the screams only to find the appellant cutting Ethangata on the head and legs. Moses then ran back to **James Mutia (PW4)** to report what he had just witnessed.

On his part, **Johana Mitu (PW3)** testified that on 8<sup>th</sup> October, 1991 at about 6:00 p.m., he was going to the home of Ethangata but before he got there, he saw the appellant cutting Ethangata with a panga. According to Mitu (PW3) the appellant cut the deceased Ethangata on the head and legs.

It was the evidence of **James Mutia (PW4)** that on 8<sup>th</sup> October, 1991, at about 8:00 p.m. he was at his home when he was informed that the appellant who was his brother had killed both his father Ethangata and nephew Koome. From that time the appellant was never seen until eleven years later. The incident of the killing was reported to the police and the two bodies were taken to Maua Hospital for postmortem examination.

**Jeremiah Ntoiti (PW5)** testified that on 23<sup>rd</sup> December, 2002 he received information that the appellant had been seen in Timau. As a result a report was made to Maua Police Station and police officers from Maua assisted in arresting the appellant at Kiambogo Village from where he was taken to Timau Police Station.

**Cpl. Florian Wamalwa (PW6)** collected the appellant from Timau Police Station and investigated the case by recording statements from the relevant witnesses.

The last prosecution witness was **Dr. John Awala Ogolla (PW7)** who produced the postmortem reports in respect of the deceased Ethangata (*a male African aged 60 years old*) and Edward Koome (*a male African aged 22 years old.*) According to the post mortem reports the cause of death of the two deceased persons was severe loss of blood which led to shock.

When put to his defence the appellant denied the offence and said that he did not know how his father and nephew died. He denied having a quarrel with his father on 8<sup>th</sup> October, 1991 and went on to say that he had no grudge with either of the two deceased. It was his case that he only had a problem with his brother **James Mutia (PW4)**. He denied disappearing from home after the incident in issue.

The learned judge summed up the evidence to the remaining two assessors who unanimously agreed that the appellant was guilty as charged in both counts.

The learned judge considered the evidence of the prosecution witnesses, the defence put forth by the appellant, and in the end came to the conclusion that the appellant was guilty as charged in both counts. In concluding his judgment delivered at Meru on 28<sup>th</sup> January, 2008 the learned judge said:-

**"15. From the above summary of the evidence, the Assessors in this case found the accused person guilty of both counts (sic) of murder. On my part, the evidence is consistent because PW1, PW2 and PW3 were all eye witnesses who saw the accused person viciously cutting his nephew, Koome and his father, Ethangata with a panga on the material day. They died from their injuries and the evidence of all those witnesses was not shaken nor was it challenged in any way. PW4, the accused's own brother later found the accused holding the murder weapon and when he tried to speak to the accused, the accused ran away and was apprehended only 11 years after the incident. The act of disappearing for**

*all these years was itself conduct wholly inconsistent with innocence more so where the deceased persons were close relatives of the accused person. I say this well aware as was said in KIOKO VS. REPUBLIC [1983] KLR 289, that the burden of proof never shifts to an accused person but the fact of disappearance only corroborates existing factual evidence about the accused's conduct on the material date.*

**16. In this case, I am satisfied that the accused was properly identified at the scene by persons who knew him very well and that it was he who literally slaughtered his father and nephew merely because his nephew had returned a cow taken by the accused from his father's home. The anger of the returned cow caused the accused to react in the most vicious and senseless manner possible. His defence that he did not quarrel with his father and that he did not kill him and the other is a bare lie which cannot in the face of the evidence on record be taken seriously and I reject it.**

**17. On both counts of murder, I am satisfied that the accused is guilty as charged and shall convict him.**

**18. I hereby sentence him to death on the first count and suspend sentence on the second count pending any proceedings on appeal and execution of the first sentence.**

**19. Right of Appeal explained**

**20. Orders accordingly.”**

It is the foregoing that provoked this appeal in which the appellant was represented by Ms. Lucy Mwai. The State was represented by Mr. J. Kaigai, (Principal State Counsel).

Ms. Mwai abandoned all the grounds of appeal in the Memorandum of Appeal filed by the appellant in person save *ground 3* in which the appellant raised a constitutional issue of having been kept in custody for a period longer than 14 days before being taken to Court. This ground can be dealt with before we come to the other two substantive grounds in Supplementary Memorandum of Appeal which were as follows:

**“1. The learned Judge erred in law and in fact in convicting the Appellant on the basis of the contradictory evidence of the witness.**

**2. The learned Judge further erred in law and in fact in convicting the Appellant for an offence which was not proved to the required standards.”**

On the issue of breach of the appellant's constitutional right to be brought to court within 14 days, it is not very clear as to what happened especially in view of the fact that the appellant had to undergo committal proceedings in the subordinate court before being formally arraigned and charged in the superior court. As correctly pointed out by Mr. Kaigai, the appellant was represented by counsel in the superior court where that issue should have been raised and determined. As of now, we do not have sufficient material to enable us to make any conclusive finding that the appellant's Constitutional rights were breached. We find no merit in that ground which we accordingly dismiss as unmeritorious.

On the two grounds in the Supplementary Memorandum of Appeal, Ms. Mwai argued that the two prosecution witnesses (*P.W.1.* and *P.W.2.*) gave contradictory evidence to the extent that they may not have been truthful witnesses. It was further argued that the offence was not proved to the required standards in that the appellant's defence of alibi was never considered. Finally, Ms. Mwai was of the view that the matter be referred to the High Court for the purposes of mitigation.

On his part, Mr. Kaigai supported both conviction and sentence. He was of the view that the evidence against the appellant was overwhelming as *P.W.1.*, *P.W.2.* and *P.W.3.* were eye witnesses. Mr. Kaigai further argued that the conduct of the appellant of running away only to appear after eleven years was consistent with his guilt.

Finally, Mr. Kaigai conceded that the learned judge should have allowed the appellant to say something in mitigation before sentence. On that ground, Mr. Kaigai was of the view that the matter could be taken back to the superior court.

This being a first appeal, it is our duty to reconsider the evidence, re-evaluate it and draw our own

conclusions. In ***NZIVO V. R.* [2005] 1 KLR 699 at pg 701** this Court said:-

*“As this is a first appeal, we are duty-bound to reconsider the evidence, evaluate it and draw our own conclusions. Those guidelines have been repeated time and again by this Court and we need only refer to *Okeno vs. R* [1972] EA 32 at page 36, where the predecessor of this Court said:*

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R* [1957] EA 336) and to the appellate court’s own decision on the conflicting evidence and draw its own conclusions. (*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 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”***

It is in view of the foregoing that we set out the summary of the evidence adduced by the prosecution in the superior court, the defence of the appellant and the learned judge’s findings thereon.

The evidence before the superior court was rather straightforward. The incident took place in broad daylight and the appellant was not only well known to the witnesses but a relative. He was a brother to Mutia (PW4). However, the key prosecution witnesses were ***Joel Kainga*** (PW1), ***Moses Ntangai M’Miriti*** (PW2) and ***John Mitu*** (PW3). In his evidence in chief, PW1 testified inter alia:-

***“The accused person then cut Koome into pieces using a panga which he had been having since he met me on that day. I saw him cutting Koome and I ran away. He cut Koome on the head. As I ran away his father was grazing cows a short distance away. I went to my area for grazing cows. Later I returned to the scene where Koome had been cut and I found Koome and the accused’s father dead and also one goat had been killed there. I never saw Stanley Kamairo again. I do not know when he was arrested. I am seeing him today for the first time since that day.”***

In his evidence in chief, ***Moses*** (PW2) testified inter alia:-

***“I recall 8<sup>th</sup> October, 1991 at 2:00 p.m. I was sent by James Mutia to take Miraa to M’Ethangatha. The letter (sic) was father of James. I did so and found M’Ethangatha grazing his cows. He was alone and I gave him the Miraa and stayed with him until about 5 p.m. when he was taking his cows home. He sent me to collect firewood for him and I did so until 5:30 p.m. As I was going back I heard M’Ethangatha screaming. The distance was 150 metres away. I rushed and then saw Kamairo cutting him with a panga. I then ran away. He was being cut on the head and leg. I did not return to the scene but went back to James Mutia’s home and told him what had happened. Kamairo is here with a muslim cap (points at accused).***

On his part, ***Mitu*** (PW3) testified inter alia:-

***“I recall 8<sup>th</sup> October 1991 at 6:00 p.m. I was in my shamba in Irambeni. I was there from 10:00 a.m. to 6:00 p.m. I went to the home of Isaiah M’Ethangatha. Before I got there I saw Kamairo cutting M’Ethangatha cutting (sic) his father with a panga. The deceased was cut on the head and legs. When I saw what Kamairo was going (sic), I hid myself in bushes nearby for about 20 minutes and then I ran away to call James Mutia, son of the deceased. I told him and we returned to the scene. We found the deceased had indeed died and Edward Koome was also dead near the house. We went to report at Maua police station and we came back to collect the bodies which were taken to Maua hospital.”***

Having considered the foregoing and the evidence in its entirety, we are satisfied that the appellant was seen by the three witnesses on the material day and place as he cut the two deceased persons i.e. the appellant’s father (Ethangata) and nephew (Koome). We are in entire agreement with the learned judge that it was the appellant who ***“literally slaughtered his father and nephew.”***

We have considered the submissions by both Ms. Mwai and Mr. Kaigai and we agree with Mr. Kaigai that the evidence against the appellant was overwhelming. That being our view of the matter, we find no merit in this appeal against conviction. Hence the appeal against convictions on the two counts is dismissed.

That, however, is not the end of the matter. It is to be observed that the appellant was charged with two capital offences and convicted on both counts. The learned judge, very correctly, decided to sentence the appellant on the first count and suspended the sentence on the second count. In ***GANZI & 2 OTHERS***

V. R. [2005] 1 KLR 52 at p. 61 this Court said:-

***“We would like to repeat the observation of this Court in Muiruri v. Republic [1980] KLR 70 that where a person is charged with a number of capital charges, it is preferable to proceed with one capital charge only and leave the other capital charges in abeyance even if the other charges appear inter-linked.”***

We hope the above will be observed in cases in which accused persons are charged with a number of capital charges.

The last issue to be considered in this appeal is the fact that the appellant was sentenced to death without being given an opportunity to say something in mitigation. That is even more crucial in view of the decision of this Court in **GODFREY NGOTHO MUTISO V. R.** in Criminal Appeal No. 17 of 2008 (unreported) in which the Court stated:-

***“We may stop there as we have said enough to persuade ourselves that this appeal is meritorious and the Attorney General was right to concede it. On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare that section 204 shall, to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the constitution, which as we have said, makes no such mandatory provision.”***

The Court then further stated:-

***“The appellant in this case was entitled to have his antecedents and other mitigating factors recorded for purposes of assisting the President in exercise of the prerogative of mercy but no information was recorded. The learned Judge of the superior court simply imposed the death penalty upon convicting the appellant. In doing so the learned Judge was in error because under section 329 of the Criminal Procedure Code, he was entitled, before passing sentence, to receive such evidence as he thought fit in order to inform himself as to the proper sentence to pass. The consequence is that we have no information on which we can assess the correct sentence. We are informed that the death sentence was commuted to life imprisonment, but again that is not because of any information supplied by the court. The appellant may well be deserving of the death penalty or life imprisonment in view of the gravity of the offence committed and the circumstances of the deceased’s death, or a lesser penalty, but then again, making such findings would be arbitrary. We must re-emphasize that in appropriate cases, the courts will continue to impose the death penalty. But that will only be done after the court has heard submissions relevant to the circumstances of each particular case.”***

In view of the foregoing and in all the circumstances of this case, the order that commends itself to us is to remit the case to the superior court with the direction that the superior court records the prosecution’s as well as the appellant’s submissions before deciding on the sentence that befits the appellant.

***It so ordered.***

***Dated and delivered at NYERI this 19<sup>TH</sup> day of NOVEMBER, 2010.***

***E.O. O’KUBASU***

.....  
***JUDGE OF APPEAL***

***P.N. WAKI***

.....  
***JUDGE OF APPEAL***

***D.K.S. AGANYANYA***

.....

**JUDGE OF APPEAL**

*I certify that this is a  
true copy of the original.*

**DEPUTY REGISTRAR**