Wanyonyi v Republic (Criminal Appeal 11 of 2020)
[2025] KECA 1642 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1642 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 11 OF 2020

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

OCTOBER 3, 2025

BETWEEN

MOUREEN NAFULA WANYONYI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma, (Riechi, J.) dated 23rd October 2019 in HCCRC No. 18 of 2017)

JUDGMENT

1. This is a first appeal against the conviction of and sentence imposed on the appellant, Moureen Nafula Wanyonyi, who was charged on the information of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on or about 2nd March, 2017, at Khalumani sub-location within Bungoma County, she unlawfully caused the death of Francis Wanyonyi Wesusia, ("the deceased"), by pouring hot water on him, thereby inflicting fatal burns. She pleaded not guilty to the information and her trial subsequently ensued in earnest.

2. In summary, the facts leading to this appeal are that on the afternoon of 2nd March, 2017, Grace Wangila Monaki (PW1), a relative of the deceased, heard distress screams of "Mama nakufa" (mother, I am dying) from the house of the deceased. She rushed to the scene and found the deceased, walking from his house towards the road, visibly injured with the skin peeling off. He told her that his wife, the appellant, had poured hot water on him whilst he was sleeping. Neighbours then gathered, and took him to a nearby clinic. Dorcas Nekesa Manyoli (PW2), a niece to the deceased, also responded to the screams. She found the deceased outside his house, in pain, who also told her that hot water had been poured on him by the appellant while he was lying in bed. She and her husband ferried him to the hospital, where he died on 26th March 2017. APC Peter Muthini (PW3), an Administration Police officer, received a report of the incident from a village elder and proceeded to the scene. He found the

deceased who had extensive burns, screaming for help. He immediately arrested the appellant who was present.

3. Brenda Wanyonyi, (PW4), the minor daughter of both the deceased and the appellant, witnessed her mother boil water and pour it on the deceased while he was asleep. She added that the deceased had assaulted the appellant the previous night and that such violence was recurrent. PC Kipchumba Kuto (PW5), the investigating officer, confirmed that the deceased sustained 36% burns and was unable to record a statement due to his condition. He later died; and he subsequently attended the postmortem. He noted that the couple had a history of domestic violence, including an altercation involving another woman on the day of the incident. Following the conclusion of the investigations, he preferred the information against the appellant.

4. Dr. Edward Bilembo, (PW6) a medical officer, conducted the postmortem on the body of the deceased. He noted extensive third- degree burns on the face and head; and concluded that the cause of death was cardiopulmonary arrest due to the burns.

5. Put on her defence, the appellant, in a sworn defence stated that she returned home from work on the material day at about 12:30 p.m. and began preparing lunch. While doing so, the deceased who appeared intoxicated arrived accompanied by another woman unknown to her. The woman sat in the sitting room while the deceased came to the kitchen, where he confronted the appellant and struck her with a stick, prompting her to defend herself. As they struggled the deceased accidentally fell into the boiling water. He then stood up and walked out of the house. Neighbours and police officers arrived shortly thereafter, and she was arrested. She denied intentionally pouring hot water on the deceased and maintained that the incident was an accident.

6. In its judgment the trial court found that the prosecution had proved the fact and cause of death through medical evidence and eyewitness accounts. The trial court also found that the appellant had deliberately poured hot water on the deceased. That the appellant knew that pouring hot water on a person would naturally cause grievous harm. This, coupled with the severity of the injuries and the circumstances of the act, led the trial court to conclude that malice aforethought had been established as required under Section 206 of the Penal Code. Accordingly, the trial court convicted the appellant on the information and sentenced her to 20 years imprisonment

7. Being aggrieved by the said conviction and sentence, the appellant is now before this Court on a first and perhaps last appeal on the grounds that the trial court erred in law and fact by: failing to appreciate that the prosecution had not proved its case beyond reasonable doubt; failing to appreciate that the trial lacked the essential elements of a fair hearing; disregarding her evidence and written submissions without providing reasons and imposing a sentence that was wholly unjustified.

8. When the appeal was called out for hearing, the appellant was represented by learned counsel, Mr. Menezes B, whereas, Ms. Mwaniki, learned Senior Assistant Director of Public Prosecutions appeared for the respondent. The appeal was canvassed by way of written submissions with limited oral highlights.

   Counsel for the appellant submitted that the trial court erred in relying on the uncorroborated and unsworn testimony of PW4, a minor, without sufficient corroborating evidence. He cited the case of Stephen Mungai Maina v Republic [2020] eKLR, where the court held that although a child of tender years may be a competent witness, his or her evidence must be corroborated.

9. On malice aforethought, counsel cited the case of Hyam v DPP [1974] AC, where the House of Lords held that malice aforethought is established only when an accused person knew it was highly probable that his act would result in death or serious bodily harm of the deceased. He submitted that

the prosecution failed to prove this mental element beyond reasonable doubt; and that the incident was spontaneous, arising from a domestic altercation. Counsel further added that this was a clear case where the battered woman syndrome would come to the aid of the appellant as a complete defence.

10. For this proposition counsel relied on the case of Kamande v Republic [2025] KESC 18 KLR and State v Truphena Ndonga Aswani [2021] KEHC 8758 (KLR). On failure to call key witnesses, counsel invoked the case of Bukenya & Others v Uganda [1972] EA 549, to posit that the prosecution must make available all witnesses necessary to establish the truth, and that failure to do so may lead to an adverse inference being drawn against the prosecution by the trial court. He also cited the case of Kitera v Republic [2007] 1 EA 135, to reinforce the point that while the prosecution need not call a superfluity of witnesses, it must call enough witnesses to prove the case beyond reasonable doubt. Counsel insisted that Judith Nanjala, the woman whom the deceased had come with to the house was a crucial witness who ought to have testified, but was not summoned to testify. That being the case, the trial court ought to have drawn adverse inference against the prosecution and in favour of the appellant.

11. On sentence, the appellant submitted that the trial court failed to take into account the history of domestic abuse and the psychological impact of prolonged violence on the appellant by the deceased. He relied on the case of Fredrick Ambani Naitiri v Republic [2014] eKLR, where the High Court held that sentencing must be commensurate with the offender's moral blameworthiness and the totality of circumstances. He once again cited the case of State v Truphena Ndonga Aswani (supra), where a woman suffering from battered woman syndrome was sentenced to a one-day non-custodial sentence, emphasizing the need for judicial sensitivity in such cases. On the contradictions and inconsistencies in the prosecution's case, counsel invoked the case of Pius Arap Maina v Republic [2013] eKLR, where the court reaffirmed that any evidential gaps in the prosecution's case must be resolved in favour of the accused. He argued that the prosecution's failure to corroborate PW4's testimony and to call key witnesses created such gaps, warranting the appellant's acquittal thereof.

12. The appeal was opposed. In doing so, counsel for the respondent submitted that the deceased's death and its cause was undisputed. Similarly, the appellant's presence at the scene of crime on the material day was undisputed. She argued that the deceased had made dying declarations to PW1 and PW2 pointing out the appellant as the person who had poured hot water on him, and that these statements were admissible as dying declarations under Section 33(a) of the Evidence Act. That the prosecution case was further supported by the testimony of PW4, who witnessed the appellant boil and pour hot water on the deceased while he was asleep.

13. Turning to malice aforethought, counsel relied on Section 206(a) of the Penal Code, in submitting that the act of boiling water and pouring it on a sleeping person's head demonstrated clear intent to cause grievous harm or death. She emphasized that this was a premeditated act, and that the trial court had properly found malice aforethought established. In support of the principle that every homicide is presumed unlawful unless justified, counsel cited the case of The Queen v Sharmpal Singh [1962] 22 EACA 392, where the court held that a homicide is only excusable if committed under justifiable circumstances such as self-defense. She argued that the appellant's claim of prior abuse did not justify the act, especially since the deceased was asleep at the time of the attack and therefore the concept of battered woman syndrome was inapplicable in the circumstances. Ultimately counsel dismissed the appellant's defence as a mere denial and an afterthought, asserting that it did not at all shake the prosecution's case.

14. On sentence, counsel submitted that the prescribed maximum penalty for murder is death, and that the 20-year sentence imposed on the appellant was even lenient given the circumstances. She argued that the appellant showed no remorse and therefore the sentence was both lawful and appropriate. Concluding, counsel pleaded with the court to dismiss the appeal in its entirety.

15. This is a first appeal. As such, this Court is required to re-evaluate, re-analyze, and re-appraise the evidence adduced before the trial court and draw its own conclusions, always bearing in mind however, that it did not have the advantage which the trial court did, of seeing and hearing the witnesses, and must therefore make due allowance for that. See Okeno v Republic [1972] EA 32.

16. Upon our careful consideration of the record and submissions, the issues we discern for our determination in this appeal are: whether the prosecution proved its case against the appellant beyond reasonable doubt; and whether the sentence imposed was lawful and appropriate in the circumstances. The death of the deceased, its cause and the presence of the appellant at scene were not disputed at all by the appellant and or his counsel. Indeed, the appellant concedes to all the foregoing save that she never poured hot water on the deceased but that he accidentally fell into it.

17. Then there was the dying declaration. Under Section 33(a) of the *akn ke act 1963 46 Evidence Act*, dying declarations are admissible if made in contemplation of death. In the case of Choge v Republic [1985] KLR 1, this Court held that such declarations must be treated with caution but may be relied upon if corroborated. In this case, the deceased's statements to PW1, and PW2 that it was the appellant who had poured hot water on him were consistent and corroborated by the medical evidence of PW6, which confirmed third-degree burns as the cause of death. There is no doubt at all that the statements by the deceased were made in contemplation of death as indeed soon thereafter he passed on.

18. A lot of fuss, has been made by the appellant regarding the trial court's reliance on the unsworn and uncorroborated testimony of PW4. The appellant contends that this violated Section 124 of the *akn ke act 1963 46 Evidence Act*, which requires corroboration of evidence of a minor unless he or she is a victim in a sexual assault. See the case of Stephen Mungai Maina v Republic [2020] eKLR.

19. In the present case, PW4's account was corroborated by the dying declarations made by the deceased to PW1 and PW2 and medical evidence which confirmed that the deceased died from severe burns. Moreover, the trial court found her testimony consistent and credible.

    We cannot impugn this assessment of the trial court on the demeanor of witnesses as we never saw her testify and the trial court was better placed to make such an assessment. We must therefore be beholden to the assessment in that regard. We are in the premises unable to find any error in the trial court's reliance on her evidence, especially given the available corroborative circumstances.

20. On malice aforethought, Section 206 of the Penal Code defines malice aforethought to include amongst others:

    a. an intention to cause death or grievous harm;

    b. knowledge that the act will probably cause death or grievous harm.

21. In the case of Hyam v DPP (supra), the House of Lords held that malice aforethought is established where the accused knew it was highly probable that the act he or she was undertaking would result in death or serious grievous harm. The act of boiling water and pouring it on a sleeping person's head was inherently dangerous and likely to cause grievous harm. The appellant's knowledge of this consequence is inferred from the nature of the act. The trial court rightly found that malice aforethought was thereby proved. We agree with the trial court's conclusion that the act was deliberate and not accidental, as claimed by the appellant. Of course, the appellant has advanced the argument of a battered woman syndrome "BWS" to impugn inference of malice aforethought. A BWS is a pattern of signs and symptoms displayed by a woman who has suffered persistent intimate partner violence be it psychological, physical or sexual. In other words, BWS is the psychological effects of experiencing

persistent domestic or intimate partner violence. Put simply, it describes the trauma and mental health effects of living with abuse at the hands of an intimate partner.

22. Essentially what the appellant is saying is that she did what she did in self defence as a result of the deceased's acts of cruelty towards her. She could not handle it anymore. The acts of the deceased had driven her to the edge and to the point of no return. She had to fight back. To posit all these, counsel relied on the cases of Kamande v Republic and Truphena Ndonga Aswani v Republic (all supra). However, counsel failed to appreciate that in the case of Kamande v Republic, the Supreme Court held that the BWS has not attained the status of a stand-alone defence and that it has to be raised in aid of or as an extension of one of the existing legal stand-alone defences; such as self-defence, provocation or temporary insanity. That courts cannot singularly elevate the BWS to a stand-alone defence of itself as to do so would amount to usurpation of the legislative mandate bestowed upon Parliament under our Constitution. The Court went further to hold that such a defence, if at all, should be raised at the earliest opportunity in the same manner as any other defence. It should not be left to the court to infer.

23. In sum total, while the High Court and this Court have showed a willingness to factor in domestic abuse as a mitigating circumstance, the Supreme Court in Kamande case declined to elevate BWS to a standalone defence, insisting on procedural and evidentiary rigour. The jurisprudence thus remains open-ended, awaiting a case where BWS is properly pleaded, supported by expert evidence, and integrated into the trial process from the outset.

24. In the current case, BWS was not raised at the trial stage. The appellant's defence at trial was that the incident was accidental and occurred during a physical confrontation with the deceased. The issue of BWS was introduced for the first time in this appeal. However, as noted in the Supreme Court's judgment, BWS must be pleaded and supported by expert evidence during the trial so as to be considered substantively. Since it was not raised during the trial or mitigation it could not be treated as a formal defence or ground for acquittal but only as a mitigating factor on appeal.

25. Given the foregoing elucidation of the concept by the Supreme Court, it must be obvious that the concept finds no foothold in the circumstances of this case.

26. On failure to call key witnesses, the case of Bukenya & Others v Uganda [supra], teaches us that the prosecution must make available all witnesses necessary to establish the truth, and that failure to call any of those witnesses may lead to an adverse inference being drawn against the prosecution by the trial court. But we also know that the prosecution need not call a superfluity of witnesses to prove a fact. All it is required is to call enough witnesses to prove the case beyond reasonable doubt. In this case, the appellant laments that Judith Nanjala, the woman whom the deceased had come with to the house ought but was not summoned to testify. Having been the straw that broke the camel's back, how would her evidence have been relevant to the prosecution's or even the defence case? In any event what stopped the appellant from summoning her if she deemed her evidence was vital?

27. On sentence, the appellant was sentenced to twenty years' imprisonment following her conviction. Counsel reiterated that the trial court failed to consider her history of domestic abuse and psychological trauma, as well as the circumstances under which the offence was committed. In the case of Thomas Mwambu Wenyi v Republic [2017] eKLR, this Court emphasized that sentencing must reflect the offender's moral blameworthiness and the totality of circumstances, citing with approval the principle that punishment must be "appropriate, adequate, just and proportionate" to both the nature of the crime and the manner in which it was committed. We are satisfied that the appellant's conduct though not exculpatory was not adequately considered by the trial court in assessing the appropriate sentence to be imposed.

28. In the case of State v Truphena Ndonga Aswani (supra), the court imposed a non-custodial sentence on a woman suffering from domestic violence, underscoring the need for judicial sensitivity where domestic violence is a factor.

29. Upon re-evaluation of the record, we are satisfied that the appellant's defence; that the deceased was intoxicated, violent, and that the incident occurred during a physical confrontation was not adequately addressed by the trial court. The trial court failed to engage with the plausibility of the appellant's account or to assess its impact on culpability. While the defence did not absolve the appellant of criminal liability, it introduced mitigating factors that ought to have been weighed more carefully.

30. In light of the appellant's prolonged pre-trial and post-conviction custody, the absence of prior criminal record, and the domestic violence context of the offence, we are persuaded that the sentence imposed was excessive. We therefore reduce it to the term already served, which we consider sufficient in the circumstances. The appellant shall therefore be set at liberty forthwith unless otherwise lawfully held. To that limited extent, the appeal on sentence succeeds.

DATED AND DELIVERED AT KISUMU THIS 3 RD DAY OF OCTOBER, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR