Loka v Republic (Criminal Appeal 126 of 2019)
[2025] KECA 67 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 67 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 126 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 24, 2025

BETWEEN

PAUL BARASA LOKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment and sentence of the High Court of Kenya at Busia (F. Tuiyott, J.) dated 8th July 2016) in HCCRC No. 13 of 2015)

JUDGMENT

1. Paul Barasa Loka (the appellant herein) was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, that on 10th January 2015 at about 5.30 am at Radacho village, Bunyala North Location within Busia County, he murdered Joseph Ojiambo Loka, the deceased, who was his step-brother.

2. The appellant was tried and convicted of the offence and sentenced to death. Being dissatisfied and aggrieved with both the conviction and sentence, the appellant has now appealed to this Court. This being a first appeal, we are mindful of our duty as 1st appellate court, as was well articulated in Erick Otieno Arum vs. Republic [2006] eKLR as follows:

> "It is now well settled, that a trial court has the duty to carefully examine and analyze the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e.) a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of

seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same"

3. The evidence before the High Court was that in the early hours of 10th January 2015, Gift Nakitare Odhiambo, PW1, was asleep in her grandmother's house, when the appellant went to the house at 4.00am. She was able to recognize the appellant's voice, as he called out Silvanus Loka, her grandfather's name. As the grandfather was opening the door, the deceased emerged and asked the appellant what he wanted that early; the appellant announced that he wanted their father, Silvanus, to give him his share of land. The deceased recommended that the appellant waits for daybreak to resolve any issues he had. The appellant did not heed to this; went towards a house he used to occupy, and dared the deceased to follow him, the deceased responded that he was not interested in a fight. As the appellant's voice trailed in the distance, PW1 heard him say that he had "wanted" the deceased for a long time, as the latter was the cause of their father not giving him land.

4. Shortly PW1 heard sound of stones landing on the ground near her grandfather's house. PW1 then telephoned Joseph Otieno Akhuma, PW2 (the immediate neighbour) to inform him what was going on, but he did not answer immediately. PW1 further testified that her grandfather went to separate his two sons; and shortly PW1 saw her grandfather seated on the ground and the deceased was lying on the ground, and standing over the deceased with a torch was the appellant while shouting, "Today I have dealt with you."

5. The deceased was calling out for help, but the appellant threatened to deal with him. She was able to see all the three people with the aid of bright light from the torch that the appellant held; and sensing danger PW1 ran to their neighbour, Ocheno and told him and his wife, what had happened. They returned to the scene, and PW1 noticed stones and a stick next to where her father lay. The neighbours tried in vain to get a vehicle to take the deceased to hospital, but he succumbed to his injuries. Meanwhile, a crowd had gathered and some people tried to chase after and catch the appellant, but he outran them, and escaped.

6. PW2 testified that he heard a knock and the voice of PW1 at his door at about 5.30am in the morning on the material date. Carrying his walking stick and torch, PW2 left with his spouse and went to the direction of some voices when he heard the appellant say, 'today I shall kill you' in Banyala language. PW2 shone his torch on the appellant who was standing next to the deceased; he saw the appellant assaulting the deceased using a stick, and at some point, the appellant threatened to attack PW2 and threw stones at him. PW2 took cover and raised the alarm. Members of the public responded, and the appellant ran away. PW2 further testified that the deceased had injuries on his head and left hand, and was still breathing, but unfortunately there was no vehicle to take the deceased to hospital.

7. Dr. Edwin Osino Gudu, PW3 produced the post mortem examination report. It showed that the deceased had sustained multiple bruises and wounds on the scalp, a bruise along the left shoulder, multiple defensive wounds on both forearms, large bruise on anterior chest wall and lower margin of chest, bruise on left thigh, multiple defensive wounds on both legs, fracture on left humerus and left tibia. Internally there were bruises on the anterior surface of the lungs and bleeding in the right chest cavity. In the digestive system the liver was lacerated and there was multiple bleeding into the abdominal cavity; and on the head there was multiple bleeding on the surface of the brain. The doctor opined that the cause of death was massive internal bleeding resulting in shock caused by multiple blunt force trauma. John Obuka Loka, PW4, the deceased's brother, identified the body to the doctor for purposes of conducting the post mortem.

8. PC Paul Kamau Mwangi, PW5, investigated the matter. He visited the scene and went to the deceased's home where he found members of the public, and he interrogated PW1 and PW2. At the scene PW5

recovered a stick, the murder weapon, which was produced in court. PW5 also found the body lying under a tree shed. The body was removed and taken to the morgue. The appellant was arrested on 1st May 2015.

9. The appellant, in his defence, told the court that the deceased was his step brother; and that on the date in question at about 5. 30 am he was at home when he heard someone at the door. On enquiring who it was, there was no answer and assuming that it was one of his colleagues he opened the door only to be hit on the head. The assailants followed him and hit him a second time on the jaw resulting in loss of a tooth. The appellant could not tell who the intruder was as he was dressed in a black hooded coat. The appellant, on asking who it was, the assailant replied: "you are not a child of this home and we must kill one another today."

10. The appellant then snatched a rungu from the assailant, who fell to the ground and the appellant hit the assailant on his back. The appellant left the scene and went to wake up his father and told him what happened. On returning to the scene with his father, they realized the deceased was dead. The appellant further testified that members of the public surrounded his house where he stayed until the body was removed from the scene, he attended the funeral after which he went to attend to his business as a fisherman.

11. Upon his return home in April 2015, he was confronted by a lady at the town centre who asked him where he had been; then asked him to accompany her to the police post where he was arrested.

12. The trial Judge was of the view that the issue arising for determination was which version of the physical confrontation was to believed? If the appellant's version was to be believed, should he be convicted of manslaughter or acquitted all together? and finally, whether malice aforethought was proved.

13. The trial court in determining which account of events was to be believed, relied on the post mortem report, which extensively described the injuries, taking note that the defensive wounds were a testimony to the fact that the deceased was under attack and sought to defend himself; and as such the medical evidence was aligned with the evidence of PW1 and PW2, that it was the appellant who attacked the deceased. PW2 in particular saw the appellant hit the deceased twice with a stick, and that his evidence supported the doctor's finding that the cause of death was massive internal bleeding resulting in shock caused by multiple blunt force trauma. The court then reached the finding that without any provocation, the appellant attacked and assaulted the deceased, inflicting on him fatal injuries.

14. As regards the defence proffered by the appellant, the trial court found the same unsustainable, pointing out that after the incident which occurred on 10th January 2015, the appellant left home only to return in May 2015, and that his conduct was not consistent with that of an innocent person.

15. On malice aforethought, the trial court found that the appellant inflicted grievous bodily harm to the deceased and the injuries were severe and extensive, that the assault involved inflicting repeated blows on the body of the deceased; and that this showed only one intention of the appellant, that is, to cause grievous harm to the victim, and as such malice afterthought was established.

16. Having considered all the evidence in its totality, the trial court found the appellant guilty of the offence as charged and sentenced him to death.

17. The appellant has raised 3 grounds in the memorandum of appeal dated 13th February 2024, that the ingredients of the offence of murder was not established; that the trial court wrongly applied circumstantial evidence; and the court ignored the ground of self-defence and provocation.

18. In opposing the appeal, the respondent through Ms. Busienei, the Senior Principal Prosecution Counsel, submits that the evidence was direct, consistent, corroborative and proved that the appellant

murdered the deceased person; that the direct evidence placed the appellant at the scene, a fact confirmed by the appellant who during his defence stated that he was attacked by the deceased.

19. As regards the issue of self-defence and/or provocation raised by appellant, the response is that the issue was analyzed by the learned Judge in his judgment; and that the appellant's version of events cannot explain multiple bruises on the body of deceased; or the presence of defensive wounds on the forearms and both legs of the deceased and fractures. Further, that the struggle for the rungu, the single assault on the back and fall on the ground could not possibly result in the extensive injuries suffered by the deceased.

20. It is contended that without any provocation, the appellant fatally attacked and assaulted the deceased as established by the uncontroverted evidence of PW1 and PW2, that the deceased was assaulted by the appellant using sticks and stones and the stick was produced in court as evidence.

21. As regards identification, it is pointed out that PW2 had a torch which he used to illuminate and see the appellant assaulting the deceased using a stick. PW1 identified the appellant through his voice as he had interacted with him in the past five years, as the appellant used to frequent his grandfather's home and he is a step brother to his father, the deceased; that PW2 was an immediate neighbour, and knew both deceased and appellant. The learned counsel contends that, the appellant, upon fatally assaulting the deceased, went to hiding and was arrested on 1st May, 2025 that is about four (4) months after the incident; that this subsequent action of hiding after the act proved he was the one who fatally injured the deceased.

22. The appellant was charged with murder under Section 203 of the Penal Code. The section provides that:

> Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. The prosecution in an information of murder has the singular task of proving the following 3 ingredients to secure a conviction; that the death of the deceased has occurred; that the death was caused by an unlawful act of commission or omission by the accused and that the accused had malice aforethought as he committed the said act. See Chiragu & Another vs. Republic (Criminal Appeal 104 of 2018) [2021]KECA 342 (KLR) (17 December 2021) (Judgment).

23. The fact that a death occurred is not disputed. The stick which was the murder weapon was produced in court and the medical report was proof of the injuries sustained by the deceased.

24. In Omar vs. Republic (2010) 2KLR 19 at page 29, this court stated:

> " So, by the appellant hitting the deceased on the neck with a bottle, he must have intended to cause her at least grievous harm. Indeed, the blow using a bottle caused a fatal wound on the deceased. The evidence clearly shows the appellant had the necessary malice aforethought."

25. This Court adopts the same reasoning, taking note that the appellant triggered the attack, and after an altercation the deceased had multiple internal and external injuries caused by blunt force trauma. The weapon used was a stick and the medical evidence corroborate the injury as well as the weapon used. There is no other plausible version of how the deceased could have suffered the injuries, we are satisfied that the appellant is the one who inflicted the injuries on the deceased, and that he did so with malice aforethought. His conviction for the offence of murder is therefore safe, and we dismiss his appeal against conviction.

26. With regard to the severity of sentence, Section 379 (1)(a) &(b) of the Criminal Procedure Code provides for this Court's jurisdiction to entertain an appeal against sentence from the High Court exercising original jurisdiction. The State has conceded to the setting aside of the death sentence, and proposes that the appellant be sentenced to 40 years imprisonment.

27. In Francis Muruatetu & Another vs. Republic, [2017] eKLR, while pointing out the unconstitutionality of the mandatory nature of the death sentence for persons charged with murder, the Supreme Court of Kenya gave sentencing guidelines with regard to mitigation before sentencing in murder cases at paragraph 71 of the judgment as:

a. Age of the offender,

b. Being a first offender,

c. Whether the offender pleaded guilty,

d. Character and record of the offender, Commission of the offence in response to gender- based violence, remorsefulness of the offender,

e. Any other relevant factor.

28. In the same case the Supreme Court in regard to the application of mitigation by the accused before sentencing stated thus:

> " it is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more that censure or in the converse impose the death penalty."

29. This Court notes that in his plea in mitigation, the appellant stated that he was a first offender, he was remorseful and had dependants, and had been in remand custody for a year while awaiting trial, so he sought for leniency. In Chai vs. *Republic (Criminal Appeal 30 of 2020*) [2022] KECA 495 (KLR) (1 April 2022) this Court observed that the two holdings of the Supreme Court in the Muruatetu case made it very clear and underscored the importance of receiving and considering mitigating circumstances, and also of applying applicable sentencing guidelines, even though the latter are a guide.

30. To justify a death sentence the ruling should have spoken to it, showing in black and white what the court considered. The learned judge had apparently called for a probation officer's report, and he considered the mitigation, but indicated that the only sentence provided under the law, was the death sentence. It is apparent the learned judge felt inhibited to exercise his discretion in meting out the sentence, due to the then existing practice of pronouncing the mandatory sentence; and in the absence of any demonstration of factors that could have led to such a sentence we find the same to be excessive.

31. Considering the circumstances of the case, the injuries that were inflicted on the deceased, and the appellant's mitigation, we consider a sentence of thirty (30) years imprisonment to be appropriate. We, therefore, set aside the death sentence that was imposed on the appellant, and substitute thereto a sentence of thirty (30) years imprisonment. The sentence shall be computed from 4th May, 2015, which is the date that the appellant was first arraigned in court, as the appellant remained in custody throughout his trial.

32. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF JANUARY, 2025.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR