Chela v Republic (Criminal Appeal 79 of 2021)
[2025] KECA 49 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 49 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 79 OF 2021

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JANUARY 24, 2025

BETWEEN

FRANCIS CHARO CHELA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Malindi (C. W Meoli, J.) delivered on 3rd March, 2015 in Malindi High Court Criminal Case No 25 of 2015)

JUDGMENT

1. The appellant, Francis Charo Chela, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that, on the night of 20th October, 2012 at Kijiwetanga Village in Kijiwetanga Sub Location Malindi Location, within Kilifi County, the appellant murdered Lilian Tatu Iha (the deceased)

2. He pleaded not guilty and the matter proceeded to hearing where the prosecution called 8 witnesses.

3. The facts are that on the night of the alleged incident, PCF, PW1, the son of the appellant and the deceased, aged 14 years, whilst asleep heard some noise. He woke up and saw the appellant, his father, assaulting the deceased, his mother. When he intervened, the appellant struck his head with an axe and he became unconscious. When he regained consciousness, he found himself with his mother in a pit and he could see the appellant was covering them in the pit with sand. He pretended that he was dead and, after the appellant left them, he pushed the sand off him and managed to breath until daybreak. He regained his strength and went to a nearby home where he reported the incident to a lady who called the village elder, and he was taken to hospital. PW1 stated that the deceased had died by the time he regained consciousness and that it was the appellant who assaulted her.

4. Kadzo Kenga PW 2, was at home at about 6 am when PW1 went to her home. He had a cut wound on his head and blood was dripping from his face. She assisted him to dress and then called the village

elder, Kaingu Thoya PW3, who accompanied PW1 and PW2 to his home where PW1 showed them a freshly dug pit near a mango tree. When they removed the sand from the pit, they found the body of the deceased.

5. Karisa Baya PW4, the assistant chief also accompanied PW2 and PW3 to the appellant's home and was shown the pit. PW1 also narrated to him how the appellant had buried him together with his mother. They uncovered the body of the deceased, which was covered with sand which had blood on the head.

6. Baraka Changawa, PW5's evidence was that, on the fateful morning, PW1 went to his house. He was naked and asked for a pair of shorts which PW5 gave to him. He also saw that PW1 had a cut on the head.

7. Benjamin Safari Chela PW6, the appellant's brother, testified that on 21st October, the appellant's sister Gladys Charo, PW,7 came to his homestead with instructions that he should take care of the appellant's child, and that she should bring the child to him. He stated that he was already taking care of his brother's two other children and was therefore angry and went to the appellant's home to confront him. On reaching his home, he found people in the compound and was informed that the appellant had assaulted his wife and son. He saw the body of the deceased in the compound.

8. PW7, the appellant's sister, stated that the appellant had called her to his home. When she arrived the following day, she found the appellant with a small child. The appellant gave her the child and told her that he and his wife, the deceased, had a disagreement, and that she had gone back to her parent's home. She took the child to PW6 and later learnt that the body of the deceased was found in the compound and that there were allegations that the appellant had murdered her and assaulted PW1.

9. Dr. Mumina PW8, a pathologist and colleague of Dr. Makokha, who examined the deceased's body, stated that the postmortem report indicated that the body was covered with sand and blood; and that the deceased sustained a deep fracture to the skull caused by a pointed sharp object. He stated that the death of the deceased was due to hemorrhage caused by the injury to the brain.

10. Cpl. Thomas Okumu, PW9 was the investigating officer who investigated the murder and arrested the appellant, while, Ibrahim Abdulahi PW10, a clinical officer attended to PW1, who had a cut wound on the head; and that PW1 informed him that he was cut by an axe on the head by his father, the appellant.

11. When put on his defence, the appellant, a Kenya Defence Forces officer, testified that on the date of the alleged incident, he returned home at 8pm and saw someone running away. He confronted his wife who did not respond, but rather spoke "in proverbs". He became angry and stressed and because he is epileptic he passed out. When he woke up in the middle of the night, he found that his wife was deceased and his son PW1 was missing and assumed that he had run away. The next morning, he called his sister to take his son. He was later arrested. He stated that he was epileptic and that he had passed out and had a problem with his ears.

12. The trial Judge, upon considering the evidence, convicted the appellant of the offence of murder and sentenced him to serve 23 years imprisonment.

13. Aggrieved, the appellant has filed an appeal to this Court on the grounds that the learned Judge was in error in law in failing to appreciate that malice aforethought was not present when the deceased was killed; in failing to consider that the murder was as a result of provocation and that, therefore, the charge should be reduced to manslaughter; and in failing to appreciate that no psychiatric report was produced by the prosecution despite the fact that the appellant suffered from epilepsy.

14. The appellant and the respondent filed written submissions. When the appeal came up for hearing on a virtual platform, learned counsel for the appellant Ms. Mulago relied on the written submission

where it was submitted that the appellant was mentally ill when the unfortunate events that led to the death of the deceased occurred; that the court ought to have made a special finding of guilty by insanity as in the case of Wakesho vs Republic (Criminal Appeal 8 of 2016) [2021] KECA 223 (KLR).

15. Counsel submitted that, for this reason, the appellant did not have malice aforethought given his state of mind at the time of the unfortunate incident that led to the death of the deceased, and that the sentence was too harsh and excessive.

16. For her part, learned prosecution counsel for the State, Ms. Kanyuira, submitting on the issue as to whether there was provocation, and whether the offence was one of manslaughter, stated that provocation was not proved because PW1 saw his father assault the deceased; and that PW1 stated that he was also struck with a sharp object. On this basis, counsel submitted that the claim that he was provoked was a sham, and that the defence was not available to him.

17. On whether the appellant was epileptic and therefore suffered from mental insanity, counsel submitted that the only record of any medical condition was a prescription issued a few days to his defence by an unqualified person aimed at attempting to fabricate evidence. It was submitted that epilepsy is not a mental illness; that his attempts to conceal the body of the deceased and PW1 meant that he had the mental capacity to appreciate the nature of his actions. Counsel concluded that the prosecution proved its case to the required standard.

18. This is a first appeal. In the case of Okeno vs. Republic [1972] EA 32, the jurisdiction of the Court on first appeal was delineated as follows:

> " 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 vs. R. [1957] E.A. 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs. R., [1957] E.A. 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 the lower Court's findings and conclusions; it must make 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 vs. Sunday Post, [1958] E.A. 424."

19. The duty of this Court was also restated by this Court in the case of David Njuguna Wairimu vs. Republic [2010] eKLR as follows:

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions.
>
> We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

20. Having considered the material that was before this Court, the only issue commending itself for determination is: i) whether the evidence adduced before the trial court was sufficient to convict the appellant; and ii) whether malice aforethought was established, or whether the defences of provocation and insanity were available to the appellant.

21. The offence of murder is provided for under section 203 of the Penal Code thus:

> " Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

22. In order for the offence to be established four crucial ingredients must be proved beyond a reasonable doubt by the prosecution. These are:

a) The fact of the death of the deceased;

b) The cause of such death;

c) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly,

d) Proof that the said unlawful act or omission was committed with malice aforethought.

23. In reiterating the ingredients necessary to establish the offence of murder, this Court in the case of Roba Galma Wario vs Republic [2015] eKLR expressed itself thus:

> "For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."

24. On the fact of the death of the deceased, there cannot be any doubt that the deceased died. This was established by the evidence of PW1, PW2, PW3, PW4 and PW8. The postmortem report adduced by Dr. Mumina specified that the deceased was 34 years old of poor nutrition and physique. Her body was pale and covered in mud, especially the hair which was soaked with blood. She had a scalp wound on the right temporal area with fracture extending to her brain measuring 3 x 2 cm. The report concluded that the death was caused by haemorrhage due to penetrating skull injury secondary to assault with a pointed sharp heavy object, and that the injury went through the skull.

25. On the issue as to whether the evidence adduced before the trial court was sufficient to establish that the appellant caused the injuries that led to the deceased's death, PW1 described how he saw the appellant assault the deceased and, when he intervened, the appellant attacked and hit him and he lost consciousness. When he came around, he found himself in a pit with his mother and the appellant was covering it with sand.

26. On identification of a perpetrator, this Court in the case of Peter Musau Mwanza vs. Republic [2008] eKLR expressed:

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question."

27. The appellant was not a stranger to PW1. He is his father, and a person well known to him. In the circumstances, as was observed by the learned Judge, we too are satisfied that the appellant was positively identified through recognition as the person responsible for the fatal injuries that led to the deceased's death.

28. Having so found, it was the appellant's case that when the offence was committed, he was provoked and labouring under mental insanity; that he suffers from epilepsy and that, at the time, he was undergoing an epileptic episode, and so he was not aware of his actions.

29. On whether the defence of provocation was available to the appellant, provocation is defined in Section 208 of the Penal Code as:

> "(1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person, who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master and servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered".

30. The test in respect of the defence of provocation varies from case to case. Addressing this issue in the case of Wero vs Republic (1983) KLR 549, this Court held that:

> "where a person accused of killing another raises the defence of provocation, it is a question of fact whether the accused, in all the circumstances of the particular case, was acting in the heat of passion caused by grave and sudden provocation when he killed that person..."

31. In his evidence, the appellant stated that he met a stranger in his house and questioned the deceased, who responded to him in "proverbs", causing him to become angry and pass out due to an epileptic episode. There was no evidence that he acted in the heat of passion or was suddenly provoked as to lead him to act in the manner he did. In fact, his entire defence is based on his mental incapacity at the time of the incident, and at no time did he raise the defence of provocation during the trial. We are of the view that raising the defence for the first time before this Court is an afterthought, and we accordingly reject it.

32. The appellant next claimed that he suffers from epilepsy and that, on the material day, he became mentally insane during one of the epileptic episodes. In determining the question of the appellant's alleged insanity, the trial Judge in the instant case concluded that:

> " In the instant case, there is no credible evidence that the accused had epilepsy or any disease affecting his mind. Secondly, it is remarkable that the accused appears to suffer from selective amnesia regarding the events of the material day. He recalled everything that happened before and after the murder rather clearly. He even had the presence of mind to call PW7 in the night to collect the small child from the home early on the next day. In addition, he made efforts to conceal the crimes by burying PW1 and the deceased in a pit, and threw sand and branches over it.
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> His account beyond recalling his argument with his wife and his dissatisfaction with her explanation concerning the alleged intruder he met at the door, does not recall anything more until the early hours of the next day. It is telling that the only record tendered to support his alleged epileptic condition is a chit showing the prescription of drugs a few days from the date of his defence, which was issued by an unqualified intern. This evidence was clearly a fabrication conjured by the accused to escape liability in the same manner he earlier attempted to conceal his crimes. I reject the defence of insanity in this case and find that the accused was sane and capable of forming the necessary intent relevant to the offence. The

accused armed himself with a pick axe. He assaulted his wife using the said axe, as well as PW1 when he intervened."

33. Section 2 of the *Mental Health Act* defines a person suffering from a mental disorder as "a person who has been found to be suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and a person suffering from mental impairment due to alcohol or substance abuse."

34. Regarding his mental state, the law on sanity and insanity is set out in sections 9 to 12 of the Penal Code.

35. Under section 11, every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.

36. Section 12 provides for the application of the defence of insanity in the following terms:

> "A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is, through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission."

37. This section must be read together with section 9 which specifies:

> "(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident."

38. This section was considered by this Court in the case of George Ngugi Mungai vs Republic [2000] eKLR where it was held that:

> "We wish to observe that the defence of insanity as contained in our Penal Code was not taken from the holding in the M'Naghten case, but from rules which were made in England following the decision in that case and which came to be known as the M'Naghten's Rules. The defence of insanity having been incorporated in our Penal Code there is clearly no necessity of falling back on the M'Naghten Rules. Section 12 of the Penal Code, which we quoted earlier, sets out the whole gamut of the defence of insanity. As this Court stated in the Marandu M'Arimi case (Supra), the onus is on the appellant to show on a balance of probabilities that at the time of the act or omission giving rise to the charge or charges against him he was suffering from a disease which affected his mind to the extent that, at the time of the act or omission complained of, he was incapable of either understanding what he was doing or of knowing that he ought not to do the act or make the omission in issue."

39. Further explaining the nature of the defence in the case of Leonard Mwangemi Munyasia vs R [2015] eKLR, this Court stated:

> "Under the rule, insanity is a defence if at the time of the commission of the act, the accused person was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

40. Again, in the case of Wechuli vs Republic (Criminal Appeal 16 of 2021) [2023] KECA 1125 (KLR), this Court reiterated that:

> " The defence of insanity is an affirmative defence that exculpates an accused person from any criminal liability if it is established that at the time of the crime, the accused person did not appreciate the nature, quality or wrongfulness of his action...
>
> ...if an accused person is to advance the defence of insanity, he/she must demonstrate that at the time of the commission of the act, he/she was labouring under a disease of the mind which prevented him from knowing that what he/she was doing was wrong.
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> 21. Ultimately, the burden of proving this fact squarely lies on the accused person. The appellant having alluded to the fact that at the time he murdered the deceased, he was labouring from a disease of the mind means that the burden was upon him to show that the disease prevented him from knowing that it was wrong to kill the deceased...
>
> ...it is trite that insanity would only be a defence if it is proved that at the time of the commission of the offence, the accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act he was committing or was incapable of knowing that what he was doing was wrong or contrary to law. The test is strictly about the time when the offence was committed and no other."

41. The above cited authorities indicate that insanity would only be applicable as a defence in cases where, at the time the offence was committed the accused person was suffering from a mental illness and, was either unaware of his or her actions, or was incapable of being aware that his or her actions were unlawful and contrary to law. What is necessary to consider is the accused's state of mind at the time of commission of the offence.

42. To place the issue of whether the appellant met the threshold set out above in context, a brief recount of the proceedings and the evidence as it transpired is necessary. During plea taking, the appellant took plea and did not raise any issues as to his mental capacity. Throughout the entire trial, he was able to proceed with the matter without the occurrence of any epileptic episodes.

43. In so far as the evidence that was before the trial court was concerned, PW1 testified that he woke up to find the appellant attacking his mother, the deceased, and, when he intervened, the appellant attacked him with an axe. He later buried both of them in the compound. PW7 stated that the appellant called her on the night of the incident and requested her to come and take his young son. When she went to the appellant's home the next morning, the appellant gave her his son and told her that he had a quarrel with the deceased who had gone back to their home with PW1.

44. In his defence, the appellant stated that he was a Kenya Defence Force (KDF) officer. Yet, he did not proffer any medical evidence to support the claim that he suffered from epilepsy prior to the incident. Neither did he provide any account of previous attacks or produce any work record detailing a history of epilepsy whilst he was employed as a Kenya Defence Force Officer. The only available evidence on his alleged condition was that of DW2, a clinical officer who testified that he was with the appellant on 14th August 2014, and that he prescribed him some medicine. When cross- examined, DW2 stated that he is an intern, and that he had not diagnosed the appellant with epilepsy; that, in cases of an epileptic episode, the victim usually becomes unconscious and incapacitated, and that an epileptic episode does not amount to mental insanity. When the evidence taken together with the facts preceding and after

the incident are evaluated, we can find nothing that discloses that the appellant suffered from mental illness, or that pointed to his having suffered an episode of insanity on the night in question. To the contrary, they are indicative of a person who was in control of their faculties, and supremely cognitive of his actions. Consequently, as was the learned Judge, we too are not persuaded that the appellant proved the defence of insanity.

45. So, was malice aforethought proved? The ingredients of malice aforethought are found in section 206 of the Penal Code thus:

> "(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
>
> b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
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> c. An intent to commit a felony;
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> d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

46. In the case of Republic vs Tubere s/o Ochen [1945] 12 EACA 63, the court identified those circumstances on which to infer the existence of malice aforethought:

> "The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab wound or multiple injuries; the conduct of the accused before, during, and after the incident."

47. In the case of Rwabugand*e vs Uganda (Criminal Appeal 25 of 2014*) [2017] UGSC 8, the court held that

> "Circumstances from which an inference of malicious intent can be deduced are: (a) The weapon used, (b) the part of the body targeted i.e. whether it is a vulnerable part or not, (c) the manner in which the weapon was used i.e. whether repeatedly or not, or number of injuries inflicted and (d) the conduct of the accused before, during and after the incident i.e. whether there was impunity."

48. In the instant case, the postmortem report produced in evidence by the doctor PW8 indicated that the deceased sustained a deep fracture to the skull caused by a pointed sharp object, and that the death of the deceased was due to hemorrhage caused by the injury to the brain. The events that followed the attack are equally disturbing. According to PW1, the appellant dug a pit in an attempt to bury both of them, and in PW1's case, he would have been buried alive had he not regained consciousness. Considering the nature of the injuries sustained, and the appellant's appalling conduct, it cannot by any stretch of our imagination be doubted that the appellant killed the deceased with malice aforethought.

49. All in all, when the evidence in its totality is considered, there can be no question that all the ingredients for the offence of murder were established by the prosecution to the required standard; that the deceased died, and that the death was caused by the unlawful acts aforesaid on the part of the appellant

with malice aforethought; and that the High Court rightly concluded that the appellant's unlawful actions were responsible for the deceased's death.

50. In sum we uphold the decision of the High Court, with the result that the appeal against the Judgment of the High Court dated 3rd March 2015 is unmerited and is accordingly dismissed.

It is so ordered.

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

A.K MURGOR

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed DEPUTY REGISTRAR