Simiyu alias Felix Wangila Simiyu v Republic (Criminal Appeal 8 of 2016) [2025] KECA 61 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 61 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 8 OF 2016

MA WARSAME, A ALI-ARONI & WK KORIR, JJA

JANUARY 24, 2025

BETWEEN

AMOS WANGEU SIMIYU ALIAS FELIX WANGILA SIMIYU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Naivasha (C. Meoli, J.) dated 12th February 2016 in HCCRC No. 19 of 2015)

JUDGMENT

1. Amos Wangeu Simiyu alias Felix Wangila Simiyu was charged, tried, and convicted for the offence of murder contrary to section 203 as read with section 204 of the Penal Code, and was subsequently sentenced to suffer the death. The information stated that on 11th March 2015, at Sanctuary Karagita in Naivasha Sub-County of Nakuru County, the appellant murdered Silas Wafula Makokha.

2. The appellant is dissatisfied with the judgment and sentence of the High Court and is before us on a first appeal challenging the decision on the following grounds:

   i. That the Learned Judge of the Superior Court erred in law and fact in holding that PW2 was a reliable witness and that she had properly identified the appellant.

   ii. That the Learned Judge of the Superior Court erred in law and fact in convicting the appellant based on contradictory evidence.

   iii. That the Learned Judge of the Superior Court erred in law and fact in failing to afford the appellant an opportunity to mitigate before being sentenced.

3. In order to prove the case against the appellant, the prosecution called 9 witnesses. Dr. Titus Ngulungu (PW1) was the pathologist who conducted the postmortem on the deceased. The body was identified

to him by David Wanjala and Emily Wafula. Externally, the deceased had a slash wound extending to the left ear while the chest also had stab wounds around the neck and ribs which penetrated into the lungs. He concluded that the deceased died as a result of the two stab wounds from sharp force trauma. The witness concluded that the cause of death was consistent with homicide and produced a postmortem report to that effect.

4. Jane Wanjiru (PW2) was a girlfriend to the appellant but their relationship had gone sour. On the evening of 11th March 2015 at about 7.30 pm, she encountered the appellant who grabbed her and sought to know from her the whereabouts of one Silas. She did not disclose any information, took off and hid in the shops. Later that night, her mother informed her that Silas had died. The following morning, the appellant went and enquired from her whether she had disclosed their encounter the previous night to anyone. He also warned her not to disclose the incident. She, however, defied the warning and informed her brother about the encounter. When her brother came, the appellant took off. She also testified that the appellant had accused her of being in a relationship with one Gideon Wanjala who was an uncle to the deceased and that the said Gideon had previously stabbed the appellant three times before fleeing the area.

5. David Kuria Wambui (PW3) was a pastor at King's Outreach Church and a brother to PW2. He testified that on 11th March 2015, they had a fellowship at the home of one of the congregants which was attended by the deceased and PW2. Shortly after the congregants had dispersed, the lead pastor received a call that the deceased had been murdered. They went to the scene and informed the area chief. The next morning PW2 went and informed him that the person who had been looking for the deceased the previous night had appeared. When he went to confront him, the appellant took off but was later traced and arrested at his place of work.

6. Eliud Buyela Musamali (PW4) was a relative of the deceased. On 11th March 2015, the deceased passed by his home after fellowship. He gave the deceased Kshs. 50. After a few minutes, he was called by his brother Ken who informed him that the deceased had been killed. He called the deceased's pastor and proceeded to the scene with one, Wetangula, where they found the deceased's body lying close to the gate of the compound where he resided.

7. Stephen Muraya Joseph (PW5) was a neighbour to the deceased. On 11th March 2015, while he was in his house, he heard a man screaming outside that he was being killed. He immediately stepped out to find out what was happening. Once outside, he flashed his phone light and saw the deceased who was injured fall and die. The deceased did not utter any word.

8. James Odhiambo (PW6) was also a neighbour to the deceased and PW5. He also came out of his house when he heard the deceased scream. He stated that the deceased, who was covered in blood only stated that he had been stabbed by some people who had escaped.

9. David Wanjala (PW7) was a brother to the deceased. On the material day, he learnt that his brother had been stabbed. He went to the scene, where he found the deceased had died. He noted that the deceased had stab wounds on the head, neck, and chest. He acknowledged that one, Gideon Wanjala was his nephew and that in December 2014, Gideon Wanjala had stabbed the appellant before disappearing. He also stated that he visited the appellant, and the matter was discussed and resolved. PW7 testified that he was one of those who identified the body of the deceased for postmortem purposes.

10. PC Leah Chesang (PW8) of the Tourist Police Unit, Naivasha testified that on 13th March 2015, while she was in her house she was informed that the appellant who was suspected of murdering the deceased had been traced. She accompanied the reportees to Gorge Farm where she arrested the appellant. Upon searching him, she recovered an identity card with the names of Felix Wangila though the reportees had

given his name as Amos. She handed over the appellant to the Directorate of Criminal Investigations at Naivasha.

11. PC Stephen Maina (PW9) testified that on 11th March 2015, while on crime standby duties at Naivasha Police Station with PC Kamau, they received a call from their officer in charge who informed them of a murder at the Sanctuary area. Upon arriving at the scene, they found the deceased's body bleeding from stab wounds on the chest. They then took the body of the deceased to a mortuary at Naivasha. On 13th March 2015, the appellant was handed over to him by the Tourist Police. He stated that he investigated the matter and preferred the charges against the appellant.

12. When called upon to state his defence, the appellant denied committing the offence and proceeded to give an account of his whereabouts on 13th March 2015, when he was arrested. He also reiterated that he had no grudge against the deceased but that he knew him and where he lived.

13. This appeal came up for hearing on 8th July 2024 when learned counsel, Mr. Konosi appeared for the appellant while learned State counsel, Mr. Omutelema appeared for the respondent. Counsel having filed their respective submissions opted to wholly rely on them.

14. Counsel for the appellant relied on submissions dated 2nd November 2023. Although those submissions bear the number of this appeal and the name of the appellant, the contents are in respect of a different appeal altogether. We will therefore not belabour to rehash the submissions as they have no bearing on this matter.

15. In opposing the appeal, counsel for the respondent submitted that the prosecution discharged its mandate and that the evidence on record, though circumstantial, pointed to the appellant's culpability beyond reasonable doubt. Counsel referred to the evidence of PW2 and submitted that the identity of the appellant was not in doubt. Mr. Omutelema referred to section 137 of the Criminal Procedure Code (CPC) to submit that the appellant was properly described in the charge sheet. Counsel also stated that the error in referring to the deceased as Cyrus Maina in the charge sheet was not prejudicial to the appellant. Counsel contended that sections 306 (2) and 213 of the CPC were complied with and that the appellant having had the benefit of representation by counsel was not prejudiced. From whence this submission arise, we have no understanding for the information dated 16th March 2015 which clearly states that the deceased is Silas Wafula Makokha. Concerning the sentence, counsel urged that the circumstances of the case called for a severe sentence hence the death penalty should be maintained.

16. We are seized of this matter in our capacity as a first appellate Court. Our mandate as per section 379 (1) of the CPC is akin to a retrial because it incorporates a re-consideration of facts and the law. The only caution is that, unlike the trial court, we did not have the benefit of seeing and hearing the witnesses testify in order to gauge their demeanour. Conscious of this mandate, we have reviewed the record and memorandum of appeal, as well as the submissions and authorities, relied on by the respondent. In our view, what arises for determination is whether the offence of murder was proved against the appellant and if so, whether the death sentence was appropriate in the circumstances of the case.

17. For a trial court to return a conviction on a charge of murder, the prosecution must prove the fact and cause of the death of the deceased person, that it is the accused person whose actions or omissions led to the deceased's death, and, that the accused person had malice aforethought. See Roba Galma Wario vs. Republic [2015] eKLR.

18. This was a case based on circumstantial evidence. It is thus necessary that we recall the threshold for convicting an accused person on circumstantial evidence. The threshold was set by the Court in Abanga alias Onyango vs. Republic (CR. App. No. 32 of 1990) LLR No. 3975 as follows:

> " It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:
>
> i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
>
> ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> iii. The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

19. Similarly, the Court reiterated the applicable principles in Joan Chebichii Sawe vs. Republic [2003] eKLR as follows:

> " As we have already pointed out, the evidence in this case was entirely circumstantial. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused."

20. These two authorities succinctly capture the threshold that must be met by the prosecution in order for circumstantial evidence to result in a conviction. That is the standard to which we shall subject the evidence adduced in this case. PW2 to PW7 were all acquainted with the deceased and they confirmed that he was indeed dead. All the prosecution witnesses with the exception of PW1, PW2 and PW8 saw the deceased's body at the scene of crime. Before PW1 conducted the postmortem on the body of the deceased, the body was identified by, among others, David Wanjala (PW7) who was a brother to the deceased. According to PW1, the deceased died as a result of severe chest injuries due to 2 stab wounds. That the death of the deceased was caused by a human hand is therefore not in doubt and neither was it disputed by the appellant.

21. The next question is whether based on the evidence on record, the facts justified the drawing of an inference that within all human probability, no one else but the appellant was complicit in the murder. None of the prosecution witnesses saw the appellant commit the offence. From the evidence of PW3, the deceased together with PW2 attended the evening fellowship on the material day. It was the evidence of PW2 that after the fellowship, she headed home before leaving for the shopping centre. She stated that while on her way, she was accosted by the appellant who asked her of the whereabouts of the deceased. This encounter happened at around 7.30 pm in the dark and the appellant had covered himself with a Maasai shuka. She got away from the appellant's grip and proceeded to the shops. Later, on the same night, she received the news of the deceased's death. The following day, the appellant went and warned her not to share with anyone information about their encounter the previous night. PW3 confirmed that his sister, (PW2), had indeed informed him of the encounter and her suspicion that

it was the appellant who murdered the deceased. He further testified that he saw the appellant in the morning but he disappeared as he was going to confront him.

22. At this point, the main question is whether PW2 was in a position to properly identify the appellant at 7.30 pm. In Cleophas Otieno Wamunga vs. Republic [1989] eKLR, the Court warned that:

> "It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

23. In Anjononi & 2 Others vs. Republic [1980] eKLR it was held that there was a difference between identification and recognition. The Court stated that:

> "Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya vs. The Republic (unreported)."

24. In this case, the evidence of PW2 was that she had lived with the appellant for some time, and, they were blessed with 2 children. This evidence was corroborated by PW3 and PW7. According to PW2, she recognized the appellant by his voice. Further, PW2 testified that the following day, the appellant visited her to warn her not to disclose the encounter of the previous night. The evidence of the relationship between PW2 and the appellant or their encounter was not controverted. In fact, the appellant referred to PW2 as his estranged wife. This set of evidence leaves no doubt in our mind that no one else but the appellant accosted PW2 aggressively, seeking to know the deceased's whereabouts shortly before the deceased met his death.

25. There is additional evidence bringing the appellant in proximity to the offence. First, there was the testimony of PW3, who confirmed that PW2 told him about the confrontation with the appellant about the whereabouts of the deceased. The warning to PW2 by the appellant not to disclose the night encounter was corroborated by the evidence of PW3, who testified that he saw the appellant the morning after the incident when PW2 alerted him of his presence. Secondly, the evidence of PW2, PW4, and PW7 was that one, Gideon Wanjala disappeared after stabbing the appellant. According to PW7, Gideon Wanjala was hosting the deceased at the time the appellant was stabbed. The deceased could have been a victim of the strained relationship between the appellant and Gideon Wanjala. From the evidence of PW2 and PW7, at the centre of it all was PW2, who had children with the deceased but appeared to have attracted the attention of Gideon Wanjala.

26. The evidence, as restated above, creates the impression that the appellant had a bone to pick with either the deceased or the family of Gideon Wanjala. As stated, the appellant met PW2 while furiously looking for the deceased. Shortly thereafter, the deceased was found dead with stab wounds. PW5 and PW6 confirmed that the appellant previously lived with them and the deceased in the same compound. There is, therefore, no doubt that the appellant knew where the deceased lived. Given an opportunity to give his side of the story, the appellant did not talk about the events of the fateful night. He did not explain his whereabouts that evening. Instead, the appellant opted to advance a mere denial and give evidence of how he was arrested.

27. The evidence, as we have rehashed and analyzed leaves no doubt in our mind that the appellant was implicated in the murder. He must have waylaid the deceased as he knew where he stayed. That explains why he wanted PW2 to keep their encounter secret. Even if their relationship was estranged, we do not see any reason why PW2 would want to fix the appellant in this matter. In the circumstances, we are convinced that based on the evidence on record, the trial court was justified in drawing an inference that within all human probability, no one else but the appellant was complicit in the murder of the deceased.

28. The next issue is whether the appellant was of malice aforethought when he waylaid the deceased and stabbed him severally. The ingredients of malice aforethought under section 206 of the Penal Code include an intention to cause the death of, or to do grievous harm to, any person; knowledge that the act or omission causing death will probably cause the death of, or grievous harm to, some person; and an intent to commit a felony. In this case, the evidence showed that PW4, PW7, and the deceased were related to one, Gideon Wanjala, who had not only stabbed the appellant but was suspected to have wanted to elope with the appellant's lover (PW2). It was also the evidence of PW4 and PW7 that at the time the appellant was stabbed, the deceased stayed in Gideon's house. In our view, the appellant wanted to settle scores. There was a possibility that he deemed the deceased to be complicit in the disappearance of Gideon. The deceased was stabbed on the neck and ribs. According to PW1, the piercings went deep into the deceased's lungs. In our view, such injuries would only be caused with the intent of causing death. The foregoing circumstances establish that the appellant was of malice aforethought.

29. The result is that the appeal against conviction lacks merit and is hereby dismissed.

30. Regarding the sentence, the appellant contended that he was denied an opportunity to tender his mitigation. We note that during sentencing, both counsel for the appellant and the Court proceeded on the understanding that the death penalty was mandatory. We must acknowledge that as at 12th February 2016 when the appellant was sentenced, the prevailing jurisprudence was that the death penalty under section 204 of the Penal Code was mandatory. However, this appeal comes in the backdrop of the Supreme Court's decision in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR, which declared the mandatory nature of the death sentence under section 204 of the Penal Code unconstitutional. The appellant is, therefore, entitled to benefit from this development of the law. The appeal against the sentence is therefore merited.

31. What, then, is the appropriate sentence for the appellant in the circumstances of this case? In this case, the appellant was a first offender. The trial court also noted that the appellant was a young man who seemed restless and troubled by marital woes. On the other hand, an innocent life was unnecessarily lost, the deceased having been waylaid on his way to his place of abode. In the circumstances, a severe prison term is called for. Considering all the circumstances of the case, 40 years in prison would suffice.

32. In conclusion, the appeal against conviction lacks merit and is hereby dismissed. The appeal against sentence partially succeeds and the death penalty is hereby set aside. In place of the death penalty, the appellant is sentenced to 40 years imprisonment. There being no evidence of the appellant having been released on bond during the trial, the prison term shall, in accordance with he proviso to section 333 (2) of the CPC, run from 16th March 2015, when the appellant was first arraigned for plea before the trial court.

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

M. WARSAME

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR