Kaura v Republic (Criminal Appeal 18 of 2016)
[2025] KECA 415 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 415 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 18 OF 2016

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

FEBRUARY 21, 2025

BETWEEN

ISAIAH NABEA KAURA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya in Meru (R. V. P. Wendoh, J.) delivered on 10th December 2015 in HC.CR.C. No. 23 of 2010)

JUDGMENT

1. The appellant, Isaiah Nabea Kaura, was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*, the particulars being that, on 29th January 2010 at Antuanduru location in Tigania East District within Eastern Province, jointly with another not before court, he murdered Barnabas Libii M'Iphili.

2. In support of its case, the prosecution called 7 witnesses. Kinyua M'Rwito (PW1) testified that on 29th January 2010 at about 5:00a.m., he went to get grass for his cattle from the forest in the company of one John Manyara (PW3). They heard screams emanating from Mungathia's farm and they went to see who was screaming. They found Mungathia, who he identified as the appellant, and one Reuben Kiunga beating Barnabas Libii, the deceased, with walking sticks. He heard Barnabas pleading with them not to beat him as he would pay for what he had stolen. He said that both him and PW3 pleaded with the appellant and Reuben to stop beating the deceased but the appellant told them to mind their own business.

3. PW1 went to call the children and relatives of the deceased and went back to the scene with them but they found that the deceased was already dead and that the body had been dragged to an adjacent farm. He said he was able to see well as it was after 5:00 a.m. and it was not dark. He confirmed that he has known the appellant since childhood as Isaiah Mungathia but did not know his other names.

4. In cross-examination, he denied that there existed any land dispute between him and the appellant's family.

5. A post mortem examination report, produced in court as exhibit by Dr. Mohamed Ahmed revealed that the body had multiple external injuries, fractures of the tibia and fibula, proximal humerus, injuries to left and lower limbs, chest cage and bruises, and extensive bleeding in the skull. He testified that the doctors who carried out the post mortem formed the opinion that the cause of death was head injuries secondary to assault with blunt objects.

6. John Manyara, testified as PW3. He confirmed that he was with PW1 on the said morning, going to look for fodder when they heard screams only to find that the deceased was being beaten by Reuben Kiunga and Isaiah Mungathia – the appellant. He knew all of them since his childhood. He said that the two alleged that the deceased was a miraa thief. He left the scene to look for fodder and later learnt of the deceased's death. He denied the allegation that the deceased was beaten by a mob, asserting that he was beaten by only two people. He also denied having had any dispute with either deceased or the appellant before.

7. Batista Gitonga (PW4) testified that on the morning of 29th January 2010, one M'Mboi informed him that his in-law had been murdered. He went and informed the local Chief and also reported the matter at Ngundune Police Station. He was accompanied by the police to the scene where they found the body had been pulled to the farm of one Mworia. They followed the trail left by the pull marks from Mungathia's (appellant's) farm to Mwora's. The police officers took the body together with the broken walking sticks that were found at the scene to the police station.

8. Veronica Nkatha (PW5), a niece to the deceased testified that she heard of the deceased's murder at about 8:00 a.m. and she went to report to the police station with the deceased's son Gitonga. She stated that she went with police to the scene to collect the body and noted that the body had been pulled from Isaiah's (appellant's) land as the grass was disturbed. She also identified the walking sticks that had been left at the scene.

9. Gideon Gitonga, (PW6) a son to the deceased stated that he was with PW5 when they went to the scene. He reiterated what PW5 told the court. He also testified that he was also present and identified the deceased's body before the post mortem was done.

10. PW7 No.82263, PC George Mutemi was the investigating officer.

    He testified that he went to the scene with the OCS, found the deceased's body in a coffee plantation that was bushy; that the body had injuries all over, and there was a walking stick beside the body and that there was evidence that the body had been dragged to the place; that they traced the drag marks from a miraa farm about 30 metres away belonging to Isaiah Nabea (appellant). There was evidence of a struggle at the said scene.

11. He testified that they did not get the appellant at his home neither did they get Reuben Kiunga as both had been mentioned as suspects and that after three months, the APs and Chief helped trace the appellant who was arrested and charged.

12. At the close of the prosecution's case, the appellant was placed on his defence and in his sworn evidence he stated that on the material day, he left home at 8:00 a.m., did his errands and on returning home at 7:00 p.m. he was informed that Barnabas had been killed at his shamba and he was being sought by police. He stated that he was arrested on 12th April 2010 yet he was at home all that time and nobody had bothered to arrest him. He said that PW1 lied to the court because the deceased was his in-law.

He also said that PW3 lied that he saw him beat the deceased. He denied seeing Kiunga, who was his neighbour on the material day.

13. While returning the verdict of guilty on the appellant, the High Court (Wendoh J.) found that the appellant and another were seen assaulting the deceased and that the deceased was found to have suffered injuries all over the body and that the multiple injuries can only be translated to mean that the assailants wanted the deceased dead and that was proof of malice aforethought. She found that the appellant guilty of murder as charged.

14. On sentence, the learned Judge held that after considering the mitigation, the only sentence prescribed at the time for the offence was death.

15. Dissatisfied with the decision, the appellant filed the instant appeal raising grounds, inter alia, that the learned Judge erred in law: by finding that the offence of murder was proved beyond reasonable doubt; in taking the prosecution evidence of PW1 without conducting a voire dire examination; in entertaining the prosecution evidence despite concluding it was adduced by a hostile and refractory witness; and by meting a manifestly harsh and cruel sentence without considering all the circumstances.

16. At the virtual hearing of the appeal on 23rd April 2024, the appellant, was represented by learned counsel, Mr. Mahugu Mbarire while learned prosecution counsel, Ms. Nandwa, represented the respondent. Both counsel relied on their submissions in entirety and did not make any oral highlights.

17. Counsel for the appellant submitted that the death sentence was passed before the Supreme Court' decision in Francis Muruatetu & Another vs Republic, the Supreme Court of Kenya Petition No. 15 & 16 of 2016, and the learned Judge had not considered the appellant's mitigation as the Court then was bereft of discretion in sentencing in murder cases. Citing this Court's decision in Chai vs Republic [2022] KECA 495 [KLR] counsel urged us to revisit the sentence and reduce it, in case we uphold the conviction.

18. With regards to ground 1, 2 and 3 it was submitted that the finding of guilt on the appellant was based on the reliance on the evidence of PW1 and PW3 who are said to have witnessed the deceased's murder.

19. On the credibility of PW1 it was submitted that although PW1claimed to have been 17 years of age, he could not avail evidence on his date of birth. Counsel went on to state that since PW1 was a minor, a voire-dire examination ought to have been conducted at the instance of the court. We can, however, at this early stage of this decision state that the said submission was a misdirection on the part of counsel. We say so because voire dire is conducted in respect of children of tender years and not on all minors under the age of 18 years. PW1 was definitely not a child of tender years. We will not belabour the point.

20. In regard to PW3, Counsel submitted that he was a hostile and refractory witness and his evidence was, therefore, not credible and the same could not be relied on. It was submitted that the said evidence was not sufficient in the context of proving the case beyond reasonable doubt so as to secure a conviction. Reliance was placed in Republic vs A.W.K. [2017] eKLR.

21. In conclusion, it was submitted that the prosecution did not prove their case beyond reasonable doubt and that there was doubt as to whether the acts complained of were in fact carried out by the appellant and further that the circumstances surrounding the acts complained of did not lend credence to the assertion that the appellant was guilty.

22. Opposing the appeal, Ms. Nandwa for the respondent submitted that the prosecution proved it's case beyond reasonable doubt by establishing all the three elements of murder as was restated in Anthony Ndegwa Ngari vs Republic [2014] eKLR.

23. With regard to the death of the deceased it was submitted that the same is not in doubt. The deceased's body was identified by PW6 who was present during the post mortem. The cause of death had also been proved as confirmed by the doctors who carried out the post mortem to be head injuries secondary to assault with blunt objects.

24. As to whether the appellant committed the unlawful acts which caused the death of the deceased, it was submitted that PW1 and PW3 witnessed the appellant with one Reuben Kiunga assault the deceased on the allegation of being a miraa thief. That the incident occurred early in the morning at 5:00 am as narrated by PW1 and PW3 and that there was additional evidence of PW4, PW5, PW6 and PW7 that the deceased person's body was dragged from the appellant's farm to the neighbour's farm. It was submitted that this proved that the deceased was murdered in the appellant's farm and later moved to Mworia's farm.

25. On identification by recognition, it was submitted that the identification of the appellant by PW1 and PW3 was positive as PW1 testified that he had known the appellant since childhood and that he had talked to the appellant at the scene. It was submitted that both PW1 and PW3 testified that it was not very dark and that one could see clearly and that was how they both saw the appellant, one Reuben Kiunga and the deceased.

26. It was submitted that the conditions of identification were favourable and that there was no room for any mistake as the identification was by recognition. Reliance was placed on Mumash Hibro Faja vs Republic [2019] eKLR.

27. As to whether the appellant had malice aforethought, it was submitted that from the evidence of PW2 the medical doctor, malice aforethought can be adduced from the evidence of PW1, to the effect that the appellant and Reuben Kiunga used walking sticks to assault the deceased which injuries were confirmed by the doctor. The same suggested that the appellant and Reuben grievously and brutally assaulted the deceased and they both knew that such injuries would cause the deceased's death.

28. It was submitted that the initial testimony of PW3 was clear that he was with PW1 when they witnessed the appellant assault the deceased. Further that there was no contradiction in the evidence of the prosecution witnesses, and that the same remained clear, concise and well corroborated. Further, that if at all there were inconsistencies as alleged by the appellant the same did not go to the root of the prosecution case. Reliance was placed in WWN vs Republic [2020] eKLR.

29. On the alibi defence that the appellant was at his house and not at the scene, it was submitted that the trial Judge took into consideration the defence and found the same as a mere denial and that the alibi was never raised during trial and was hence an afterthought. Further that PW1 and PW3 placed the appellant at the scene of crime. Reliance was placed in Mwendwa Mulinge vs Republic [2014] eKLR.

30. With regards to the sentence, it was submitted that the appellant was sentenced to death which is lawful and appropriate taking into consideration the circumstances of the case. Further that the trial Judge considered several aggravating factors when sentencing including the fact that the deceased was attacked by more than one person and the severity of the injuries he sustained.

31. We are urged to uphold the conviction and the sentence.

32. Having considered the record of appeal as well as submissions made by Counsel, we appreciate our role as a first appellate Court as was restated in Reuben Ombura Muma & Another vs Republic [2018] eKLR;

> " This being a first appeal, our mandate as an appellate Court is to analyze and re-evaluate the evidence, being mindful of the fact that, the trial court had the advantage of seeing and assessing the demeanor of the witnesses."

33. From the material placed before us, we distill the issues falling for our determination to be:

    i. Whether the appellants were responsible for the unlawful killing of the deceased;

    ii. Whether the prosecution evidence was inconsistent and contradictory;

    iii. Whether malice aforethought was proved;

    iv. Whether the trial court disregarded the alibi defence and

    v. Whether the sentence was punitive, harsh and excessive.

34. For a charge of murder to be proved, the prosecution was required to prove the three elements: First, that the death of the deceased occurred, second, that the death was caused by unlawful act or omission on the part of the accused person; and third, that the accused person had malice aforethought in causing the act or omission. See Joseph Githua Njuguna vs R [2016] eKLR.

35. In this case, the fact and cause of the deceased's death is not in question or doubt. The pathologists, Dr. Simba and Dr. Maingi through their post mortem report produced by PW2 confirmed that the deceased died as a result of head injuries secondary to assault with blunt objects. The cause of death is also not in contest.

36. Does the evidence on record prove beyond reasonable doubt that it was the appellant and another who occasioned the said injuries to the deceased? Was the deceased's death caused by the unlawful acts of the appellants? From the evidence on record, the appellant and another were seen early on the morning in question beating the deceased accusing him of being a miraa thief. It was PW1 and PW3'S evidence that they pleaded with the appellant to spare the deceased as he was offering to pay for whatever he was being accused of stealing but the appellant and his accomplice were adamant.

37. When they went back to the scene with members of the deceased's family, they found the deceased's body having been dragged from the appellant's farm to a neighbouring farm. The "pull-marks" left on the ground as the deceased was being dragged were visible to the police officers and other witnesses who visited the scene. This evidence corroborated PW1 and PW3's evidence as to what they had seen that morning.

38. This brings us to PW3's evidence which has been discredited by the appellant. When PW3 testified in the first instance, he told the court what he had seen on the material date, which tallied with the evidence given by PWI and also with his statement to the police. He was cross examined extensively by counsel for the appellant and his evidence was consistent and unshaken. About 6 months later, for unexplained reasons, the appellant applied to recall PW3. When he was recalled, he stated that he did not recall his earlier testimony in court, which led the trial Judge to note in her judgement that from the manner in which PW3 behaved, he had obviously been influenced to change his mind about what he had seen on the material day. The trial court further observed that despite him recanting what he had told the court earlier it was evident that PW3 was at the scene of the murder together with PW1.The court held that during his first testimony he was cross examined at length and his testimony remained

unshaken, and that his statement to the police was recorded when the incident was fresh. Finally, the trial court held that it was its belief that PW3 had first told the court the truth but seemed to have been influenced to come to court later to change his testimony and retract what he had told the court.

39. We are of similar view with the trial court. It is clear to us that PW3 had been prevailed upon to go back to court and change his story in a bid to weaken the prosecution case and create some doubt which he hoped would eventually benefit the appellant. The learned Judge, nonetheless, saw through the plot and declined to ignore the original evidence adduced by the witness in the first instance. We hold the view that the learned Judge's holding on the issue was correct. There was, therefore, no inconsistence in the prosecution evidence and any inconsistency as claimed by the appellant was purposely authored by the appellant in a bid to subvert the cause of justice. Unfortunately for the appellant, the trial Judge saw through their scheme and upheld PW3's original testimony.

40. We are satisfied that PW3's original evidence was credible and that it corroborated PW1's evidence to the effect that the appellant and another were the ones who viciously beat up the deceased on the morning in question and inflicted on him the injuries that resulted in his death. Actus reus for murder was, therefore, established.

41. This brings us to the question of the mens rea, or malice aforethought. Section 206 of the *Penal Code*, defines malice aforethought as follows:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances
>
> 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;
>
> c. an intent to commit a felony;
>
> d. "

42. Malice aforethought may be inferred from the acts of the accused person as stated in Ernest Asami Bwire Abanga alias Onyango vs R (CACRA No. 32 of 1990) where the Court held:

> " The question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased."

43. In effect, it is the circumstances surrounding each case that provides guidance to the court on whether an accused person had malice aforethought at the time he or she killed the deceased person.

44. From the nature of the injuries causing the deceased's death, as reflected in the post mortem form, it is evident that when the appellant and his accomplice attacked the deceased they must have intended, at the minimum, to cause him grievous bodily harm, if not death. Malice aforethought as defined above was, therefore, established to the required standard of proof. Our conclusion from the re-evaluation of the evidence is that the offence of murder was proved against the appellant beyond reasonable doubt. The appeal against conviction is without merit and we dismiss it.

45. In regard to the sentence, we have been urged to interfere with the death sentence imposed against the appellant in view of the Supreme Court decision in Francis Muruatetu & Another vs Republic, the Supreme Court of Kenya Petition No. 15 & 16 of 2016, which shifted the paradigm in our criminal jurisprudence by decreeing discretion in sentencing in murder cases. Pursuant to that decision, although the death sentence is still lawful in our country, the trial court has discretion to pass any other appropriate sentence after considering an accused person's mitigation and the circumstances surrounding each case. This decision was made after the appellant had already been convicted and sentenced.

46. We take note that the trial court accorded the appellant an opportunity to mitigate. In his mitigation the appellant stated that he was remorseful, aged 65 years and had 8 children and 2 grandchildren that depended on him.

47. In her ruling on sentence, the learned Judge while taking note of the mitigation, pointed out that the offence was serious and only provided for one sentence, being the death sentence. The position has since changed and we can re-consider the said mitigation and review the sentence and substitute the death sentence with a sentence that we deem appropriate given the circumstances of the case.

48. The respondent urges that even as we review the sentence, we should impose a stiff sentence given the aggravating circumstances in this case.

49. We have considered the appellant's mitigation and the sentiments expressed by learned counsel for the State. We note that the deceased died from the vicious beatings and his pleas to be spared fell on deaf ears. He had even offered to pay whatever he was said to have stolen. The pleas by the witnesses that the appellant and his accomplice stop the beatings were also not headed. The deceased died a painful death under circumstances that could have been avoided.

50. Having considered all the above, the sentence that commends itself to us to mete and that is just is a sentence of twenty (20) years imprisonment. Accordingly, we set aside the death sentence imposed by the High Court, and substitute therefor a prison term of twenty (20) years imprisonment from the date of conviction.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF FEBRUARY 2025.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR