Mnala v Republic (Criminal Appeal 250 of 2018)
[2025] KECA 324 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 324 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 250 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 21, 2025

BETWEEN

PAUL OWINO MNALA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kisumu (Maina, J.) dated 31st May, 2017 in HCCRC No. 65 of 2013)

JUDGMENT

1. Paul Owino Mnala was arraigned before the High Court at Kisumu (Maina, J), for the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. He was convicted of the offence and sentenced to suffer death as by law provided.

2. He is now before us on appeal, seeking to have the conviction quashed and the sentence imposed upon him set aside. The appellant has filed a memorandum of appeal raising five grounds. He faults the trial Judge for erring on law and facts: by failing to evaluate the evidence as a whole, and failing to find that the prosecution case was not proved beyond reasonable doubt; in relying on circumstantial evidence on identification without observing that the conditions prevailing at the scene of crime were absolutely difficult for a witness to make any significant identification; in failing to come to the conclusion that the required standard and burden of proof were not satisfied as the ingredient of mens rea was absent; in failing to come to the conclusion that the required standard and burden of proof, in regard to a conviction based on a dying declaration was not met; and in sentencing the appellant to death without exploring other forms of punishments.

3. This being a first appeal, we bear in mind our duty as well set out by the predecessor of this Court in the old case of Okeno -vs- Republic [1972] EA 32:

> " 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 v. 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 v. 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 v. Sunday Post, [1958] E. A. 424."

4. During the trial, the prosecution called seven witnesses in proof of their case, and the appellant made a sworn statement in his defence and called no witness. Briefly, the prosecution case was as follows: On the evening of 13th December, 2013, Jones Aulo Otieno (Jones) was with his friends Chris Bonyo, Jason Ogilo, Ochieng Ojuajo and one Solomon Omondi alias Robert Ouko (herein referred to as deceased). They were in a pub drinking. At about 10pm, they decided to call it a day. Jones, who had a vehicle, gave a lift to all his friends. He dropped Ojuajo at his home, then proceeded to drop the deceased.

5. As the deceased was alighting from the vehicle he noticed somebody standing behind the car. The deceased demanded to know what the person was doing behind the car, and apparently slapped the person. Jones got out of the vehicle to find out what was happening. He noted that the person the deceased was interrogating was a young man. The deceased inquired where the young man was from, and he took them to a house which was just facing the road. The young man knocked the door, and when it was opened, five men came out. One of the men was harsh, and the situation deteriorated into an argument. Jones pulled the deceased and pleaded that they should leave. They then went back to where they had left the car and Jones got into his car while the deceased went into his house. Jones then drove off.

6. After a while Jones asked one of his friends to call the deceased.

   After trying twice without success, the deceased picked on the third ring. He informed his friends that he had been beaten by the boys. Jones asked the deceased whether he should go back and take him to the hospital, but the deceased said he would go to hospital the next day. Jones dropped his remaining passengers and then went home. The next morning, Jones learnt from a friend, that the deceased had died. He went to Star Mortuary and found the deceased's body on the floor. Under cross-examination Jones explained that he was not very drunk as he had taken only two bottles, although they had been drinking from 7pm to 10pm. He explained that it was dark and he could not recognize the young man who was standing behind the vehicle.

7. Benter Akinyi Otieno (Benter) wife to the deceased, testified that on the material night she was woken up by some noise only, to find Noah, Steve, Owino and Nabi beating up the deceased. She screamed for help, and neighbours came to their rescue, but even after the deceased was taken into the house his assailants followed and wanted to bring him outside. The deceased had been beaten using a bottle and a rungu and he was bleeding. The deceased was taken to hospital using a motorcycle. Benter followed in a different motorcycle but when she arrived at Jalaram Hospital where the deceased had been taken, she found that her husband had already been declared dead.

8. Millicent Atieno Otieno (Millicent) is a neighbor to the deceased and Benter. On the material night she was asleep when she heard some noises. On coming out of her house she found the deceased being beaten by four people whom she identified as Owino, Nabi, Steve and Noah. She was able to identify the four using the moonlight. She noted that they had a whip and a rungu, and they continued assaulting the deceased who was in front of his house. They followed the deceased into his house and pulled him out. Nabi assaulted the deceased using a bottle and the deceased started bleeding. She, therefore, advised Benter to take him to the hospital. Deceased was admitted at Jalaram Hospital, but upon the doctor examining him he was declared dead. Owino was subsequently arrested.

9. PC Gerald Njuguna of Kisumu Police Station was at the station when Benter made a report of the incident. He went to the scene and found a crowd. On investigations he learnt that a suspect had boarded a boat and gone into the lake. He also boarded a boat and together with some neighbours went into the lake and managed to apprehend the suspect about 500 meters away.

10. PC Gilbert Tonui received the investigation file from Sgt Simba Jara who proceeded on transfer. According to the report made at the station, the murder weapon was a bottle. On the next day, Samwel Hongo Okembia - an uncle to the deceased went to Star Mortuary where the deceased's body had been kept and identified him as Solomon Omondi Oraro alias Robert Ouko.

11. Dr Dickson Muchana (Dr Muchana), a pathologist at Kakamega County Hospital performed the postmortem examination on the body of the deceased and filed the postmortem report. He formed the opinion that the deceased suffered a severe head injury due to blunt force trauma following an assault.

12. In his unsworn statement, the appellant explained that he resides at Dunga where he was arrested on the material night. He explained that he was arrested from the lake at around 6am. He said that he had been on the lake from 4pm on the previous day. He denied having assaulted the deceased, and explained that the deceased died at the home of his uncle, and that home in relation to his is about 500 meters away. He denied knowledge of whatever transpired during the night as he was away in the lake. He denied the allegation that he fled into the lake contending that he was fishing. He knew the persons who were mentioned, that is Noah, Nabi and Stephen, they were all his uncles, but he denied having been with them on the material night.

13. In support of his appeal, the appellant filed written submissions through his advocate, Mr Ogutu John Ochieng, in which he argued that the prosecution failed to prove the case against him beyond reasonable doubt. That although Benter said he saw four people beating the deceased, the distance between where deceased was being beaten and her homestead was not clearly brought out. This was important as the incident occurred at 1am when it was very dark and, therefore, identification was not possible.

14. The appellant cited Maitanyi -vs- Republic, arguing that the conditions were not favorable for a positive identification. He also referred to this Court's decision in Joseph Kimani Njau -vs- Republic [2014] eKLR; and Peter Kiambi Muriuki -vs- Republic [2013] eKLR, submitting that the circumstances as explained by the prosecution witnesses did not bring out the motive of the murder if any, nor was there any evidence of a fight or intention to kill and therefore there was no evidence that the deceased caused the death of the deceased with malice aforethought.

15. On sentence, the appellant relied on the Supreme Court decision in Francis Karioko Muruatetu -vs- Republic [2017] eKLR, in which the Supreme Court declared that the mandatory nature of the death sentence was unconstitutional, and reduced the death penalty to fifteen years imprisonment, noting that although the appellant did not say anything in mitigation he was treated as a first offender, and therefore ought not to have been given the maximum penalty of death, and that this factor was not

considered by the first appellate court. The appellant urged that he had spent a considerable period of time in custody, and had sufficiently reformed. He, therefore, urged the Court, to set aside the death sentence and substitute it with a term sentence.

16. The respondent filed written submissions through Mr. John Okoth, a Senior Prosecution Counsel in the Office of the Director of Public Prosecutions (ODPP). In opposing the appeal, Mr. Okoth stated that the prosecution adduced sufficient evidence in proof of the charge against the appellant; that Benter heard the deceased's assailants telling him they were killing him that day. She explained that there was a little moonlight which enabled her to recognize the appellant and the other assailants. The respondent further submitted that malice aforethought under Section 206(a), (b) and (c) of the *Penal Code* was established from the circumstances that were proved, namely, the extent of the injuries as confirmed by Dr Muchana. In addition, the identity of the appellant was established through evidence of recognition that was adduced by Benter who knew the appellant and was able to identify him together with others by use of the little moonlight that was available.

17. It was submitted that the evidence of the prosecution witnesses was consistent in all material aspects. The appellant and his colleagues were seen assaulting the deceased; the deceased was rescued from the hands of his attackers and taken to hospital where he was pronounced dead on arrival; and the cause of death of the deceased was not natural but was the result of an assault. Mr. Okoth argued that the prosecution case was proved beyond reasonable doubt.

18. On the issue of sentence, the Court was urged that the relevant circumstances for consideration were the circumstances under which the offence was committed; the age of the appellant; the mitigation offered by the appellant; whether the appellant appeared remorseful; the steps taken in reforming him; the period already spent in custody; and whether he was a first-time offender. Mr Okoth argued that the offence was committed in a gruesome and heinous manner; that the appellant did not appear remorseful; that considering the circumstances presented, the appellant should suffer the full force of the law; and that the death penalty that was imposed upon him should be upheld.

19. We have carefully considered the record of appeal, the submissions and the law, being alive to our duty as afore stated. The appellant having been charged with murder, the prosecution was obliged to establish the ingredients of the offence of murder in order to prove the charge. This is proof that the deceased died as a result of an act or omission on the part of the appellant, and that the appellant committed the act or omission with malice aforethought.

20. From the evidence of Benter, Millicent, Jones and Dr Muchana, the fact that the deceased died was established. His body was examined by Dr. Muchana who formed the opinion that the cause of death was "severe head injury due to blunt force trauma following assault." Both Benter and Millicent testified that they saw four people beating up the deceased, and that this is what caused the injuries on the deceased, necessitating his being taken to hospital. This evidence was consistent with the evidence of Dr. Muchana that the deceased died from injuries caused by an assault.

21. The question is whether the appellant was positively identified as one of the four persons who beat up the deceased. It was not disputed that the incident occurred at around 1am, and that the only source of light was moonlight. According to Jones, it was dark, so he could not even identify the boy who sparked off the altercation with the deceased by standing behind Jones's vehicle. This was not withstanding the fact that Jones went out of his vehicle and joined the deceased when he interrogated the boy.

22. Benter insisted that she was able to identify the deceased's assailants, because she moved close to see what was happening, and although she did not have a lamp, there was a little light from the moon. She identified the assailants as the appellant, Noah, Nabi and Steve. She claimed that she heard the men saying "Baba Ashley we will kill you" but she did not specify who exactly made that comment. Nor

did she state who had the rungu and who had the bottle with which the deceased was hit. However, she was adamant that it was the four people she mentioned who beat up her husband and that the appellant was one of them.

23. Millicent, on the other hand, testified that she found the deceased being beaten by the appellant and the other three men whom she named. She stated that she was able to identify the four because there was moonlight, and the four were people she knew as her neighbours. She said "they had a whip and rungu" but she did not specify who had the whip or who had the rungu. Under cross examination she claimed that the moonlight was bright, and she was able to see the appellant. She stated that the deceased was hit with a bottle when he was at his doorstep, and that it was Nabi who hit him with the bottle.

24. PC Gerald Njuguna arrested a suspect on the morning following the incident. He identified the appellant as the suspect whom he arrested, but he did not state the person who identified the suspect to him during the time of the arrest. However, his evidence is consistent with that of Millicent who stated during her cross examination, that she accompanied some police officers into the lake where they arrested the appellant.

25. It is evident from the above that the only evidence implicating the appellant was the evidence regarding his visual identification as one of the persons who assaulted the deceased. In Huka and Others v. Republic – [2004] E.A 266; this Court underscored the necessity of the first appellate Court examining afresh the evidence of visual identification of the accused, to ensure that any possibility of error is eliminated.

26. Similarly, in Cleophas Otieno Wamunga V Republic (1989) KLR 424, this Court stated as follows:

> " 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. ...
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> ...Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."

27. The following extracts from the decision of the Court of Appeal addressing the issue of identification in Maitanyi -vs- Republic [1986] KLR 198, is instructive and useful, even where there is more than one identifying witness:

> " It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and it position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel.

> In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these enquiries themselves. Otherwise who will be able to test with the 'greatest care' the evidence of a single witness?
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> There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognise the person, then a later identification or recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters."

28. The fact that the appellant was beaten up by four people is not in doubt, as the evidence of Benter and Millicent was in agreement in this regard. It is the correctness of the visual identification of the appellant as one of the assailants, that must be carefully weighed and tested. It is common ground that the incident took place at 1.00 am and the light that was available was moonlight. The circumstances were, therefore, difficult for a positive identification. In this regard, the nature and intensity of the light was crucial in determining the reliability of the visual identification by Benter and Millicent.

29. According to Jones, it was dark and he could not even identify the young man whom he saw the deceased interrogate. Benter described the light as "a little light from the moon." Millicent initially talked of moonlight without describing the intensity, but under cross examination, she stated that the moonlight was bright. It is apparent that the evidence of the witnesses was not consistent on the intensity of the light. If it was dark as stated by Jones, or there was a little light as stated by Benter, then the moonlight could not have been a bright moon as stated by Millicent, and the light could not have been adequate for a visual identification free of error.

30. Further, the distance between where the deceased was beaten and where the witnesses were, was crucial in determining whether the witnesses had a clear vision of the assault. In her evidence in chief, Benter did not state where the deceased was when he was beaten, and how far she was from him when she saw him being beaten by the four men. However, in cross examination, she explained that the deceased was in another homestead, in particular, the home of the appellant's grandmother, where he was being beaten.

    She did not explain how far away she was from where the assault took place, but she claimed she was able to identify the four men because she moved closer and that the "light was a little." But then again, Benter was not able to identify who among the four men stated what she heard said: "Baba Ashley, we will kill you." If it is true that she was close to where the four people were, and that they were people she knew so well as to be able to visually identify them during the night, she would have been able to see or at least identify the person who spoke through his voice.

31. On her part Millicent stated that the appellant was being beaten when he was in front of his door, and that the men followed him into the house and pulled him out, and this is the time Nabi hit the deceased with a bottle. Under cross examination Millicent estimated the distance from the appellant's home to the scene as 50 metres. Finally, neither Benter nor Millicent described the assailants, nor identified who among them was armed with the rungu or the whip. We find that neither the intensity of the light, nor the distance from which the witnesses observed the assault and saw the appellant, was established. Nor was the account of the two witnesses consistent on what they observed.

32. The visual identification of the appellant by the two witnesses was, thus, not free from error. There was a doubt the benefit of which ought to have been given to the appellant. Consequently, the appellant's

conviction having been based solely on his visual identification, the same was not safe and cannot stand. We therefore allow the appeal, quash his conviction and set aside the sentence that was imposed upon him. The appellant shall be set free forthwith, unless otherwise lawfully held.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR