Akai v Republic (Criminal Appeal 124 of 2018)
[2025] KECA 222 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 222 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 124 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 7, 2025

BETWEEN

GEORGE ODHIAMBO AKAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Siaya, (J.A. Makau, J.) dated 9th February 2017 in HCCRC No. 7 of 2016)

JUDGMENT

1. George Odhiambo Akal alias Ogallo, the appellant herein, 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 19th March 2016, at Mahanga Beach, Mageta Location, in Bondo sub county within Siaya County he murdered Kennedy Otieno Ougo (the deceased).

2. The appellant was tried and convicted of the offence and sentenced to death. Being dissatisfied and aggrieved with both the conviction and sentence, the appellant has now appealed to this court.

3. This being a first appeal, this Court is mindful of its duty as 1st appellate court. This duty was well articulated by this Court in Erick Otieno Arum vs. Republic [2006] eKLR as follows:

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

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

4. The evidence before the trial court was as follows: On 19th March, 2016, at around 5pm, Peter Otieno Odongo, PW1, returned home and found the appellant, whom he only knew by the name Odhiambo, sitting on a chair; and the appellant's friend was sleeping on a net. The pair were having a dispute whose nature was not known to PW1. PW1 went to feed the cows; and on his return he found the appellant telling his friend that he would kill him and be jailed while his friend would be taken to the mortuary. PW1 was around 6 metres away from the two. The appellant's friend got up to leave, and the appellant also got up, took a knife from a basin which had utensils, and followed his friend, who picked up a stone and hit the appellant on the head; but the appellant approached his friend and stabbed him in the chest. PW1 at this time was 10 metres away from the two. The friend fell down; and the appellant returned to his seat and put the knife on the net. PW1 called his employer, Rasta Onam (Rasta) who came to the scene, accompanied by others. Apparently, Rasta was also the appellant's employer, and he escorted the appellant to Mahanga Police Post. Police visited the scene of crime later and took photographs; they took the body of the deceased as well as PW1 who recorded his statement. PW1 identified the appellant as Odhiambo in the dock, stating that the appellant was known to him as they had the same employer (Rasta Onam). PW1 also identified the knife pointing out that it had blood stains.

5. Samuel Oyengo Onam, PW2, told the trial court that on 29th March 2016 he was mending fishing nets with the appellant, also known as Ogallo. After finishing the repairs, the net was taken to the lake; and PW2 went to watch football. Upon his return, PW2 was informed that the appellant had killed Ken, the deceased. PW2 found the appellant sitting in front of his door and the appellant told him that the deceased had provoked him, claiming that the appellant was among those who had beaten him and caused him to have a scar, so he too would also cause the appellant to have a scar. The deceased then got a stone and hit the appellant close to the eye.

6. PW2 found the appellant bleeding from the head and the deceased lying on the ground on a path near PW2's house. PW2 asked the appellant to accompany him to the station and together with PW3 took the appellant to the station. PW2 returned to the scene with police officers and also noted a hole on the left side of the deceased's t-shirt which was stained with blood. PW2 told the court that he knew the appellant for over a year as his fellow fisherman but did not know the deceased. PW2 told the court that the appellant told him that he picked a knife from the utensils, which he used a knife to stab the deceased.

7. Willis Opiyo, testified as PW3, stating that on 19th March 2016 at around 5.30pm he was at Mahanga beach when he saw a crowd of people at the home of PW2; and when he went there, he found the deceased lying on the ground with a stab wound on the left side of his chest. A hostile crowd had gathered and was baying for the appellant's blood, so PW3, PW2 and the appellant proceeded to the police station. The police visited the scene, took photographs and took the body to the mortuary. PW3 told the court that he had known the appellant for over a year and identified him on the dock as the appellant.

8. Dr. Evans Ogoti who testified as PW4, produced the postmortem report on behalf of Dr Collins Oginga, who had performed the post mortem examination on 30th March 2016. The findings were that the deceased had a stitched scalp wound measuring 10cm, a left penetrating chest injury over the upper left haemothorax measuring 2x5 cm. The opinion formed was that cause of death was penetrating injury of the chest involving the left lung with massive left sided hemothorax resultant with respiratory failure most probably from a sharp object such as a knife.

9. PC Francis Musili, the Investigating Officer, who testified as PW5 told the trial court that on 19th March 2016 at around 6pm he and his colleagues received the appellant from members of the public on allegation of having murdered the deceased. PW5 and his colleague went to the scene and found the deceased lying on his back dead. The body had a deep cut wound on the left side of the chest and found a kitchen knife on the ground a few meters from the body which was stained with blood. The knife was taken in as an exhibit and the body taken to the mortuary. PW5 recorded witness statements. The appellant was subsequently arraigned and charged with murder.

10. The appellant, in his defence, opted to give a sworn statement. He testified that on 19th March 2016 he was on Mageta Island fishing and that he did not know the deceased. He stated that on the day in question he left the lake and went to take Busaa within the island from noon to 3pm; and on his way home he met a young man he didn't know, who was blocking his path and looked drunk. The appellant then by passed the young man who asked him why he had abused him. The appellant looked back and saw the young man carrying a knife and had turned to follow him, and the appellant ran, and tripped over a stone and ran towards his home. The appellant testified that he did not know what became of the young man; but at 4.30am he heard a knock on the door, it was his employer, PW2 who asked him to accompany him to the station. He maintained that the evidence before the court was not true; and that he was put in the cells without being told why.

11. The trial court, having considered the prosecution case, was satisfied that the ingredients of the offence of murder had been satisfactorily met. The court noted that the fact and cause of death was not in dispute, pointing out that these facts were confirmed by both prosecution witnesses, PW 1,2,3,4. It was also not in dispute that the deceased succumbed to injuries inflicted by the assault. PW1,2,3 and 4, all observed the stab wound on the deceased's body. The said injuries were also confirmed by the postmortem performed by PW4 and the report produced.

12. The trial court was also satisfied that the testimony of PW1, 2 & 3 placed the appellant at the locus quo at the time the act was committed and was clear that it was the appellant who caused the unlawful act that caused the deceased's death. PW1 heard the deceased, and the appellant argue and the appellant telling the deceased that the appellant would kill him. PW1 also saw the deceased leave the house and the appellant picked up a knife, follow the deceased and stabbed him. PW1 then called PW2 who came to the scene and the accused told PW2 that he had stabbed the deceased and saw the body of the deceased. PW3 also came to the scene, found the deceased lying on the ground and the accused at the crime scene.

13. With regard to the appellant's alibi defence, that he was not at the scene on the date the offence occurred, the trial judge found that the said defence was raised late, and did not give the prosecution a chance to disprove the same. The learned judge further found that the defence could not be sustained as PW1, 2 & 3 all placed the appellant at the scene effectively dislodging the alibi defence.

14. On the issue of whether the injuries were inflicted with malice aforethought, the learned judge was satisfied that the appellant having been properly placed at the scene inflicted the injuries that led to the death of the deceased and these injuries were inflicted with an intention to cause grievous harm and/or death within the meaning of section 206(a) of the *Penal Code*; that the appellant was heard telling the deceased that he would kill him, took a knife, followed the deceased and executed his threat; that the appellant ought to have known that the act of stabbing the deceased would cause either death or grievous harm to the deceased and as such the appellant knew what he was doing.

15. Having considered all the evidence in its totality, the trial court found that the prosecution evidence was overwhelming and effectively dislodged the appellant's defence, found the appellant guilty of the offence as charged and sentenced him to death.

16. The appellant has raised 4 grounds in the memorandum of appeal namely that:

    i. It was a misdirection on the part of the learned trial Judge to impose a harsh and excessive sentence (death) despite the unconstitutionality of the death sentence,

    ii. the learned trial Judge erred in law and in fact by convicting the appellant in utter disregard and violation of the requirement that evidence in the offence of this nature requires proof beyond reasonable doubt, which the prosecution failed to offer,

    iii. the learned trial Judge erred in Law and in fact by convicting the appellant of the offence of murder instead of Manslaughter,

    iv. the learned trial Judge erred in law and in fact by convicting the appellant on the evidence of only one witness (PW1) who witnessed the alleged Murder.

17. The appellant thus prays that this appeal be allowed; the judgment and sentence be set aside; and replaced with one acquitting the him. The appellant argues essentially that the prosecution did not prove the offence beyond reasonable doubt, that the court failed in convicting on murder instead of manslaughter and the court failed by convicting on the evidence of PW1 only.

18. On the ground that the court ought to have convicted the appellant on manslaughter, it is very clear from the record and the appellant's testimony, and this court agrees with the findings of the trial court and the respondent, that the appellant never raised the defense of provocation and/or self defence. In fact the appellant in his evidence testified that the testimony that he was bleeding from the fore head as a result of the deceased hitting him with a stone was not true.

19. The appellant submits that the trial court erred in convicting him only on the evidence of PW1; that there was sufficient evidence to demonstrate that the deceased had provoked the appellant who acted in selfdefence; and in the heat of passion as the act of being hit with a stone, temporarily deprived him of the power of self- control as to warrant the offence being reduced to manslaughter. The appellant relies on the case of Mokowa vs. R [1976-80] KLR, for the proposition that selfdefence is an absolute defence even in an offence of murder.

20. The respondent on the other hand submits that this is a clear cut case of murder and not manslaughter, and thus the conviction should be upheld; that the allegation of having acted in self-defence is baseless as he was the aggressor. Secondly, that even when acting in self-defence, the force used must be proportionate to the amount of threat, yet in this case, it was clear from the testimony of PW1 that the appellant was the aggressor, borne out by the fact that while the two were arguing, the deceased moved to de-escalate the situation by walking away towards the hotel; that on seeing this, it is the appellant who stood up, took a knife and followed the deceased. The deceased on seeing the appellant with a knife, and after having just been threatened that the appellant would kill him, reasonably sensed danger; picked a stone and hit the appellant with it. The respondent contends that quite clearly, it was the deceased who acted in self-defence by first hitting the appellant with a stone. Secondly, that even if it was to be believed that the appellant acted in self-defence from the stone attack, a knife stab on the chest was not a proportionate force for self-defence to a stone attack; and this amounted to use of excessive force.

21. The respondent also points out that the appellant never raised any defence of provocation and/or self-defence; his defence was an alibi, which was dismissed by the court; that he completely removed himself from the scene of crime; and cannot now at this appellate level raise the defence of provocation and self-defence yet at the same time raise an alibi defence. We are thus urged to dismiss this ground of appeal for lack of merit.

22. We have considered the submissions made by the respective parties; the appellant was charged with murder under Section 203 of the *Penal Code* which provides that:

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

23. To sustain a charge under the said provision, the prosecution has to prove three things. First, the death of the deceased, and cause of death; second, that the death of the deceased was a result of an unlawful act or omission on the part of the accused person; and third, that the unlawful act or omission was committed with malice aforethought. (See also Roba Galma Wario vs. Republic [2015] eKLR).

24. It is common ground that the deceased died, as this fact is not substantially in dispute, several prosecution witnesses having testified that the deceased died at the scene. In our considered view, the real legal issue is whether provocation was available to the appellant as a defence. From the narrative given by PW1, an argument was going on between the pair, then the appellant made the threat to kill the deceased, and as the deceased walked away, the appellant stood up, picked a knife, and followed the deceased. The appellant was the aggressor cum provocateur- the deceased, in a panic, picked a stone and threw it at the appellant to neutralize the threat. The threat to kill, arming himself with a knife, and stabbing the deceased on the chest clearly demonstrates a malicious intention to grievously harm or snuff out the life. It, therefore, defeats logic how the defence of provocation can be available to one who is the aggressor in the first instance.

25. The question of conviction based on a single witness' evidence is a red herring, just apart from the evidence of PW1, 2 and 3 placing the appellant at the scene, the appellant's own defence is quite telling – he admitted that there was an altercation involving him. The medical findings corroborated and buttressed the evidence of PW1 regarding the manner in which the injuries were inflicted on the deceased. This court is of the view that although PW1 was the only eyewitness, his testimony was unshaken.

26. Indeed, the learned judge duly analysed the evidence; and we are in agreement with him that the appellant tried to spin a rather wild defence story which was not believable at all; the defence of provocation and self defence was not available to him. This Court is satisfied and agrees with the trial judge's finding that the appellant was placed at the scene by PW1, 2 & 3, and from the evidence on record there is no other plausible version of how the deceased was killed or by whom. We find that the conviction was safe, and we uphold it.

27. On sentence, the appellant submits that the trial court sentenced him to death on the sole basis that it was the only sentence provided for in the law; that with the recent developments in the law regarding conviction for the offence of murder, the Supreme Court in the case of Francis Karioko Muruatetu & Another vs. Republic (2017) eKLR, Petition No. 15 of 2015 (Muruatetu Case) held that the mandatory nature of the death sentence was unconstitutional. We are thus urged to set aside the sentence meted out; and that in the event that the appeal is dismissed, then we are urged to acquit the appellant of the charge of murder and sentence him to 7 years imprisonment for the offence of manslaughter to run from the date of arrest of the appellant.

28. In conceding to setting aside the mandatory death sentence, the respondent is cognizant of the jurisprudence in Muruatetu case, acknowledging that in sentencing the appellant to death, the trial Judge was constrained by the mandatory sentence not to exercise any discretion thus rendering himself. The respondent proposes a term sentence of 25 years.

29. With regard to the severity of sentence, Section 379 (1)(a) &(b) of the *Criminal Procedure Code* provides for this court's jurisdiction to entertain an appeal against sentence from the High Court acting in its original jurisdiction. In Francis Muruatetu & Another vs. Republic, [2017] eKLR, the Supreme Court of Kenya gave sentencing guidelines with regard to mitigation before sentencing in murder cases at paragraph 71 as;

    a. Age of the offender, Being a first offender,

    b. Whether the offender pleaded guilty,

    c. Character and record of the offender,

    d. Commission of the offence in response to gender-based violence,

    e. Remorsefulness of the offender,

    f. Any other relevant factor.

30. Sentencing is the discretion of the trial court, as was stated by this Court in Bernard Kimani Gacheru vs. Republic [2002] KECA 94 (KLR), that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

In the same case the court in regard to the application of mitigation by the accused before sentencing held as follows:

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

31. This Court in Chai vs. *Republic (Criminal Appeal 30 of 2020)*[2022]KECA 495 (KLR) (1 April 2022) held that the two holdings of the Supreme Court in the Muruatetu case make it very clear and underscores the importance of receiving and considering mitigating circumstances, and also of applying applicable sentencing guidelines, even though the latter are a guide; that to justify a death sentence the ruling should have spoken to it, showing in black and white what the court considered.

32. In the present case, we agree with the respondent that the learned Judge was constrained as to the nature of sentence to mete out; and he stated as follows:

> " I have considered that the accused is a first offender, he is remorseful and has a young family. I have also considered the circumstances surrounding the commission of the offence, however, the sentence provided for an offence of murder is death. I therefore sentence the accused to suffer death as prescribed by law."

33. We find that the learned Judge did not properly consider all the options that were available to him in sentencing the appellant; and we find that there is justification for us to interfere with the sentence that was imposed. We take into consideration the circumstances of the case, the injuries that were inflicted on the deceased, and the appellant's mitigation, and in our considered view, find a sentence of thirty (30) years imprisonment to be appropriate. We thus set aside the death sentence that was imposed on the appellant, and substitute thereto a sentence of thirty (30) years imprisonment. The sentence shall be computed from 5th April, 2014, which is the date that the appellant was first arraigned in court, as the appellant remained in custody throughout his trial.

Those shall be the orders of the Court.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL