



REPUBLIC OF KENYA



KENYA LAW
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**Gichana & 2 others v Republic (Criminal Appeal 57 of 2019)
[2025] KECA 179 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 179 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 57 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
FEBRUARY 7, 2025**

BETWEEN

SAMSON ONCHONG'A GICHANA 1ST APPELLANT

RAPHAEL MOKAYA GIDEON 2ND APPELLANT

GEOFERY ONUONGA ONGERI 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment and sentence of the High Court of Kenya at Nyamira (E.N. Maina, J.) dated 9th February 2017 in HCCRC No. 28 of 2015)

JUDGMENT

1. Samson Onchonga Gichana, Raphael Mokaya Gideon and Geoffrey Onuonga Ongeri (1st 2nd and 3rd appellant respectively) were charged jointly with two counts of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. In count I, it was alleged that on 28th February 2013 at Nyagacho village in Borabu District within Nyamira county, they jointly murdered Euniah Kerubo (1st deceased). In count II, it was alleged that on 28th February 2013 at Nyagacho village in Borabu District within Nyamira county jointly murdered Abinali Marwanga (2nd deceased).
2. The appellants denied the charges; were tried and convicted of both offences and each was sentenced to 30 years imprisonment. Being dissatisfied and aggrieved with both the conviction and sentence, the appellants have now appealed to this Court.



3. This being a first appeal, this Court is mindful of its duty as 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 analyze the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. 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 analyze 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 prosecution’s case is that Euniah, left her house in the morning to assist the 2nd deceased’s sister on her farm. The 2nd deceased, Abinali Marwanga, joined them for a short while before leaving for Nyagacho Primary School. Shortly a group of people brought back Euniah and also apprehended Abinali, accusing them of witchcraft. The group roughed up both deceased persons, and frog-marched them to the 1st deceased’s house to produce the book in which allegedly was recorded the names of people the deceased were going to bewitch.
5. Pauline Kwamboka, the 1st deceased’s daughter, testified as PW1 at the trial, stating that on 28th February 2012, she was cleaning the compound of their home when, at about 7.30 am, she heard noises approaching their home and realized that people were shouting that they were looking for witches. She got out of the house, locked it, and stood outside. The crowd was with her mother, the 1st deceased, whom they claimed was a witch, and Abinali (the 2nd deceased) and they demanded that PW1 unlock the house so that the 2nd deceased could produce a book which they claimed had a list of names of persons targeted for witchcraft. PW1 handed over the key to one of the villagers whom she identified as Bob Ongera, the 3rd appellant and he unlocked the house. She recognized the appellant as their neighbour whom she had known since childhood. The house was searched but no book was found. The 1st appellant whom she named as Onchonga Gichana, shoved the deceased persons into the kitchen, then the 1st and 2nd appellant sprinkled oil onto the house and set it on fire. When she tried to rescue her mother, Mokaya, the 3rd appellant, chased her away. PW1 rushed to inform her grandfather that her mother had been killed. All the three appellants were known to her as they lived in the neighbourhood.
6. PW2, Joshua Momanyi Tome, the chief of Mogisii location received a call that there was trouble in Nyagancho/Kamasira area, and he rushed there found a huge crowd gathered, they had a small book which they claimed the witches had left on the ground. They handed over the book to him. And while still trying to quell the agitated crowd, he was informed that there was greater trouble at the home of Ombaba but by the time he got to the scene, the house was completely burnt down and the deceased persons burnt beyond recognition and remains taken to the mortuary.
7. Simeon Omwenga Marwanga, a brother to Abinali, who testified as PW3 was at home on the material date when at 8 am, he heard loud noise and got out of his compound to go and find out what was happening. He realized that there were people being beaten; shortly he saw an agitated crowd passing while holding his brother Abinali Orwango Marwanga. Upon inquiring what was going on, the crowd told him to let them do their business, went past his house to the 2nd deceased’s house and conducted a search before proceeding to the 1st deceased’s home. After about two hours, PW3 noticed smoke billowing at a distance, but when he tried to go and find out what was happening, he was warned to



- keep away as he risked being killed. He later got to learn that his brother was being killed on claims that he was a witch.
8. Esther Kwamboka Marwanga, a sister to Abinali, who testified as PW4 narrated how they were attracted by the loud noise while weeding crops on her land, in the company of the 1st deceased. Curiosity had caused her brother the 2nd deceased to leave them, and headed towards the direction of the noise to find out what was happening. Shortly, a charged crowd emerged announcing that they had found the wizard book and she realized that her brother Abinali was being beaten. Upon inquiring why, he was being beaten, someone from the crowd told her it was because he was a wizard. When the 1st deceased tried to seek clarification from the 2nd deceased, she too was assaulted and dragged away. PW4 was also beaten.
 9. PW9, Dr. Rauta conducted separate post-mortem examinations and came to the conclusion that in both cases the cause of death was cardiorespiratory arrest secondary to severe burns.
 10. Nine suspects were arrested in connection with the incident. The 1st appellant was among the 9, and the 2nd & 3rd appellants were arrested later. PW5 conducted the identification parade and PW1 was able to pick out the appellants. It was following these parades that the appellants were arrested and charged.
 11. The appellants all gave unsworn statements denying the offence, and all of the appellants basically gave alibi defences. The 1st appellant stated that on the day in question, he was at his father's shamba in Riamoni at 6.30 am, where he and his wife stayed until 6 pm, went home, had supper and retired for the night. At midnight the assistant chief knocked on his door asked the appellant to dress up and took him to Keroka police station where he was charged with the offence. The appellant's testimony was corroborated by his wife whom he called as a witness.
 12. The 2nd appellant stated that he woke early to plough a shamba leased by his father and that he and his father were there from 6 am to 1 pm when it started to rain and they headed home where they learnt of the torched house. This appellant contended that he was arrested and taken to Keroka police station where charges were read to him yet he knew nothing and was not at the scene. This appellant also contends that the charges were a frame-up as the chief owed this appellant money which he had refused to repay and had threatened him with dire consequences should he stop pestering for repayment. The appellant's father who was a witness also corroborated the testimony.
 13. The 3rd appellant recalled that on the material day, he was at Nyamasini village. He then returned home on 16th March 2016 for a month. This appellant was arrested and was later told he killed someone. This appellant also accused the chief of threatening him because the chief wanted this appellant to sell him land.
 14. In their submissions, the appellants maintained that the prosecution had not proved its case beyond reasonable, that the investigation was geared at select persons as more than 10 persons were identified at the parade, and that there was no explanation why the 2nd and 3rd appellants were arrested 4 years down the line without being subjected to a parade. It was put to the court that the disputes between the chief and the appellants were the reason for the charges.
 15. The respondent on the other hand argued that it had proved its case and that the appellants were placed at the scene, were seen committing the offence, and the fact that the 2nd and 3rd appellants had evaded arrest, was not a bar to their subsequent arrest.
 16. The trial Judge identified the issue arising for determination as being whether the deceased were fatally injured by the appellants and if so whether the accused acted with malice aforethought. The trial court held that it was evident that the deceased were killed by a group of persons on suspicion of witchcraft



and that this crowd had no justification to do so as if they suspected witchcraft, they had recourse in the law and it was unlawful that they took the law in their own hands.

17. On malice aforethought the trial court recounted evidence that the crowd frog marched the deceased persons to the 1st deceased's house and upon failing to find the alleged book poured oil before setting the house on fire. The court noted that there was no way the deceased would have survived, and further that it was clear from the conduct of the crowd that intention to cause death or grievous harm, and it was not lost on the crowd that locking up the deceased and setting the house on fire would most likely cause death or grievous harm. . The crowd had the common intention to commit the offence and as such each of them was deemed to have committed the offence.
18. As to who caused the death, the trial court took into consideration the evidence of PW1 which put the 3rd appellant at the scene. The evidence of PW1 is that she saw the 3rd accused and it was him she gave the key to unlock her mother's house, and that said appellant was their neighbor and knew him since she was born; that PW1 also identified the 1st appellant as the one who shoved her mother into the house and knew him by name and that it was the 1st and 2nd appellants who sprinkled the house with fuel which was ignited and caused the fire; and that this evidence was never shaken. The learned judge was also satisfied that the offence was committed in broad daylight between 7-8 am and there was enough light to identify the appellants.
19. The learned judge also considered the testimony of PW4, who described how the 1st deceased had been dragged along by an agitated crowd when a group of people brought the 2nd deceased beating him; and when she inquired why they were beating him, they responded that he was a wizard; and that one of the people in the crowd hit her, knocking her teeth out. PW4 identified the 1st appellant as the one who was beating Abinali; and further, that she knew him well as they had attended the same primary school.
20. PW2, the Assistant Chief, testified that he knew the appellants well. The court noted that he must have known the 2nd and 3rd appellants as they both alleged that he had framed them in their testimonies.
21. From the testimonies of PW1, 2 & 4, the trial court was satisfied that they had positively identified the appellants and found the testimonies to be credible. On the defence of alibi, the trial court found the same unsustainable and an afterthought as the statements were unsworn; could not be subjected to cross examination; and the said defences were raised late in the proceedings. The learned judge noted that the 1st and 2nd appellants' witnesses were wife and father respectively, who would do and/or say anything to save them. The court further noted that the identification parades conducted were of no probative value as the witnesses already knew the appellants.
22. Having considered all the evidence in its totality, the trial court held that the evidence proved the charge, and the appellants were convicted on both counts and sentenced each to 30 years imprisonment.
23. Aggrieved by the outcome, the appellants have filed this appeal; and have jointly raised 10 grounds in the memorandum of appeal dated 19th June 2019 which can be condensed as follows:
 - a. The learned Judge erred in law and in facts in convicting the appellant on evidence which did not prove the charge of murder as charged; and the evidence by prosecution witnesses was contradictory,
 - b. the learned Judge erred in law and in fact in convicting the appellant on evidence which lacked proper and corroborating evidence of identifications of the appellant,
 - c. the learned Judge erred in law and in fact in relying on evidence of identification of only one witness which was not conclusive; and amounted to hearsay,



- d. the Learned Judge erred in law and fact in shifting the burden of proof to the appellant,
 - e. the learned Judge erred in law and fact in rejecting and dismissing the defence evidence which had displaced the prosecution case,
 - f. the learned Judge erred in law and in fact in sentencing the appellant and failed to consider the mitigation of the appellant.
24. The appellants submit that the prosecution failed to prove its case beyond reasonable doubt and that the PW1's evidence was inconsistent as to who she gave the house key to, who pushed the deceased persons into the house, and who sprinkled the fuel that was ignited to cause the fire. The appellants submitted that PW1 also identified 6 other people at the parade who were not in court, PW2 did not see the appellants at the scene and that PW4 could not identify any of the appellants on the material day.
25. In our considered view these discrepancies are not substantial, if at all, as from the record, it is clear that PW1 gave the key to the 3rd appellant and that the 1st appellant pushed the deceased into the house and the 2nd & 3rd appellant poured fuel on the house. It is this Court's opinion that the appellants were all placed at the scene and it did not matter who did what as the end goal was clear, to eliminate the alleged witch/wizard and as such acted in concert to commit the offence. This Court is in agreement with the trial court that the appellants must have known the outcome of their actions. This Court also agrees with the trial court that the identification parade with regard to the appellants was of no consequence as they had been already identified by the witnesses. Why the other 6 other suspects were not produced in court is not up for consideration as if and when they are arrested, they would face the appropriate charges. This court is therefore satisfied that the appellants were properly identified and further that the prosecution witnesses placed the appellants at the scene.
26. On malice aforethought, we take into account the trial court's consideration of the fact that PW4 identified the 1st appellant as the one beating the 2nd deceased whilst the 2nd and 3rd appellants were part of the mob that frog marched the deceased persons to the 1st deceased house in search for the 'book', to hold that the appellants acted in concert; and concur with the finding that their action on the deceased persons of roughing them up, locking them in the house, dowsing the said house in fuel and setting the same ablaze, demonstrated an intention to grievously harm or end the lives of the two. Indeed, in *Omar vs. Republic* (2010) 2KLR 19, this Court observed as follows:
- “ So, by the appellant hitting the deceased on the neck with a bottle, he must have intended to cause her at least grievous harm. Indeed, the blow using a bottle caused a fatal wound on the deceased. The evidence clearly shows the appellant had the necessary malice aforethought.
27. The post-mortem also found the cause of death supporting the burning house scenario. There is no other version of how the deceased was killed or by whom. The appellants were at liberty to name their other conspirators and they did not.
28. With regard to the sentence, in *Francis Muruatetu & Another vs. Republic*, the Supreme Court of Kenya Petition No. 15 & 16 of 2016, the court gave sentencing guidelines with regard to mitigation before sentencing in murder cases at paragraph 71 as;
- a. Age of the offender,
 - b. Being a first offender,
 - c. Whether the offender pleaded guilty,
 - d. Character and record of the offender,



- e. Commission of the offence in response to gender-based violence,
 - f. Remorsefulness of the offender,
 - g. Any other relevant factor.
29. 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 than censure or in the converse impose the death penalty.”

We take note that during mitigation the appellants stated that they were first offenders, they were remorseful, and that their families were dependent on them and prayed for leniency.

30. This Court in *Chai vs. Republic (Criminal Appeal 30 of 2020)* [2022]KECA 495 (KLR) (1 APRIL 2022) observed 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.
31. Our finding is that the trial court followed the guidelines set out by the Supreme Court with regard to mitigation and in doing so used its discretion in making an informed decision with regard to sentencing. Consequently, we hold that the appellants’ conviction and sentence for the offence of murder on both counts was safe, uphold the same, and dismiss the appeal

It is so ordered.

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

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

