Monari & 2 others v Republic (Criminal Appeal 337 & 315 of 2019 (Consolidated)) [2025] KECA 204 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 204 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 337 & 315 OF 2019 (CONSOLIDATED)

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 7, 2025

BETWEEN

EVANS NYAKUNDI MONARI ..... 1ST APPELLANT

CHARLES MOMANYI MONAYO ..... 2ND APPELLANT

JANE KWAMBOKA MONAYO ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nyamira (E. N. Maina, J.) dated 7th February 2019 in HCCRC No. 48 of 2015)

JUDGMENT

1. The appellants Evans Nyakundi Monari, Charles Momanyi Monayo, and Jane Kwamboka Monayo were jointly charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. They were alleged to have murdered Olipha Kerubo Nyakundi(deceased) on the 26th of January 2012 at Nyagacho village, Mogusii Sub-location Mekenene Location in Nyamira County within Nyanza Province.

2. The appellants pleaded not guilty and a fully-fledged hearing ensued. At the conclusion of the trial, the learned judge convicted the appellants and sentenced them to 30 years imprisonment.

3. Dissatisfied, the appellant preferred the present appeal against the whole decision.

4. In a bid to prove their case against the appellant, the prosecution called a total of six (6) witnesses. The evidence that emerged from the trial was as follows.

5. PW5, Dennis Ongoa Nyakundi (Dennis), a son of the 1st appellant and the deceased told the court that on the material day, he went home from school and had lunch with his mother (the deceased)

and his father (the 1st appellant). After lunch, his father left and at about 8pm, he returned with his uncle (2nd appellant) and his aunt (the 3rd appellant). They found him in the bedroom and his mother in the sitting room. He stated that in the house, they were using a tin lamp which one of the appellants put out as soon as they entered. The appellants did not say anything to them but instead, they set upon his mother[deceased]. His mother shouted for help but nobody went to help her. He could see what they were doing from where he was on the bed in the bedroom which did not have a door. After beating his mother, they went outside and dug a hole near the door after which his father (1st appellant) went to him and asked him where his mother was. He pointed him to the couch where she was. His father, (the 1st appellant), started screaming because she was dead. He stated that by then the 2nd and 3rd appellants had gone away. Neighbours responded to the distress call and came to the scene and that is when Dennis noticed that his mother was bleeding on the head. The witness testified that that was not the first time the 1st appellant had beaten the deceased although he did not know why he used to do that. He stated that the appellants used the handle of a hoe to beat his mother on the material night.

6. PW2, Joshua Momanyi (Joshua) the Senior Assistant Chief for Mogusii Sub-location received a telephone call from the village elder for Kamaseba village indicating that the 1st appellant and his wife Olipha (the deceased) had been attacked by gangsters. He immediately went to their house and found the deceased lying dead on a couch in the sitting room. He called Manga Police Station and police officers went and removed the body and took it to the mortuary. He advised the 1st appellant to go to the hospital as he might have sustained internal injuries.

7. Dr. Ben Lipesa Ondere who testified as PW1 conducted a post- mortem on the deceased body on 9th February 2012 at Nyansiongo Health Centre and his significant findings were multiple cut wounds on the parietal and occipital parts of the head and that there was a depressed skull fracture on the occipital region. He concluded that the cause of death was a severe head injury due to blunt trauma and a depressed skull fracture of the occipital region.

8. Corporal Jackson Kisoe (Jackson) the investigating officer, PW6, who took over from Senior Sergent Mudibo told the court that from the investigation file, he could confirm that witness statements were recorded and that the body of the deceased was found in her house. He also confirmed that a post-mortem was conducted on the body. That the deceased had head injuries and no weapons were recovered.

9. Placed on their defence, all the appellants elected to remain silent.

10. Upon, conclusion of the trial, the learned judge framed the issue for determination as to whether the accused persons killed the deceased and if they did whether it was by an unlawful act and of malice aforethought.

11. The learned judge found that malice aforethought was proved beyond reasonable doubt as there is evidence that the appellants tried to cover up what they had done by digging a hole to fool people that robbers had killed the deceased; and that to cover up their mischief, the 1st appellant pretended to Dennis that he did not know of his wife's whereabouts and he started shouting.

12. The learned judge further found that the three of them beat the deceased for no reason at all as they found her in her house and the injuries they inflicted on her were no doubt intended to kill her or to cause her grievous harm.

13. Grieved by this outcome, the appellants filed this appeal, contending that the prosecution evidence was inconsistent and contradictory; that Dr. Ondere alluded to multiple wounds on the deceased's head and opined that the cause of death was due to a head injury and a depressed skull, yet PW6 [the investigating officer] on cross-examination stated that according to the statements, the deceased was cut

on the head with a panga. Further, that when PW2 (Joshua) went to the scene, he was informed by the 1st appellant that they were attacked and injured by thugs, and Joshua advised him to go to the hospital.

14. It is further argued that in her determination, the learned judge relied on the evidence of PW5 (Dennis) in reaching a conclusion that it was the appellants who caused the death of the deceased, ignoring the contradictions in the evidence with the statement he had recorded with the police.

15. On malice aforethought, the appellants submitted that the learned judge erroneously found that the same was proved by the appellants digging a hole to cover up, yet the minor who allegedly witnessed the incident did not, in his evidence, see who dug the hole or the person who caused the fatal injury. That the witness was not credible, and his evidence was contradictory, thus, it needed to be corroborated.

16. Lastly, it was submitted on behalf of the appellants that their identification was not proper as there was no evidence connecting the appellants to the murder of the deceased. That if indeed the deceased raised an alarm when being attacked, neighbours would have responded and rushed to the scene.

17. In opposing the appeal, the respondent filed written submissions dated 25th September 2023 in which they contend that there is no basis for alleging that the learned judge based the conviction on the evidence of a single witness; and there is no bar to conviction of a single witness, in support of this argument reference is made to the case of Mohammed Boru Guyo vs. Republic (2022) eKLR.

18. It is further contended that the trial court in convicting the appellant did not expressly indicate so, however, the lack of such a statement is not a panacea to voiding the conviction. Further in his evaluation, the learned judge considered all the elements for relying on a single witness.

19. With regards to voire dire examination, the respondent submitted that the same was conducted and the judge noted that though the complainant was young, he understood the nature of the oath and directed that he be sworn and upon testifying, the appellant cross-examined the witness.

20. The respondent submitted that Dennis witnessed the incident, and he was able to identify the assailants through recognition, pointing out that Dennis was categorical that when they entered the house, they switched off the light and started beating his mother. With regard to identification by recognition, reference is made to the case of Otieno Evans Oduor vs. Republic (2021) eKLR.

21. It is further submitted that the appellants were positively identified and placed at the scene of the crime as such the appellants were correctly convicted under the doctrine of common intent. That the failure to produce the photographs of the scene of the crime is not fatal to the prosecution case especially in the instant case as there was sufficient evidence to prove the murder.

22. It is the respondent's contention that the ingredients of murder were proven to the required standards. The death of the deceased was confirmed by PW1 who produced a post-mortem report which report indicated the cause of death as a severe head injury due to blunt trauma and depressed skull fracture of the occipital region and opined that the injuries were as a result of having been assaulted with a hoe stick.

23. On malice aforethought, it is argued that in attacking and assaulting the deceased, thereby occasioning her fatal injuries as described in the post-mortem report, malice aforethought against the appellant and her accomplices was proved in accordance with Section 206 of the *Penal Code*.

24. This being a first appeal, this Court should be mindful of its duty as 1st appellate court, as was well articulated in Okeno vs. Republic [1972] EA 32, where the Court stated as follows:

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

25. Having carefully considered the record of appeal, submissions by counsel, the Court's mandate and the law, the main issue that falls for determination is whether the prosecution proved the ingredients of the offence of murder beyond reasonable doubt against the appellant and whether the sentence meted against the appellant was appropriate.

26. The appellant was charged with murder under Section 203 of the *Penal Code*. The section provides that:

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

27. 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 Roba Galma Wario vs. Republic [2015] eKLR).

28. It is not in dispute that the deceased died as confirmed by several prosecution witnesses who testified that the deceased died at the scene. This evidence was corroborated by the post-mortem report, and the evidence of Dr. Ondere, which showed that indeed the deceased died as a result of a head injury and a depressed skull.

29. The next question is whether the death of the deceased occurred as a result of the unlawful act or omission of the appellant and whether there was malice aforethought.

30. Dennis told the court that while in the house with the deceased, the tin lamp was on, and was able to identify the appellants. He recognized the 1st appellant as his father, the second appellant as his uncle [the brother to his father and the 3rd appellant as his aunt [the sister to his father]. From the evidence on record, both the appellants stayed in the same compound and the 2nd appellant used to stay with the 3rd appellant.

31. The appellant's recognition by Dennis, who was a son of the 1st appellant and a nephew of the 2nd and 3rd appellants remains uncontested – indeed, being well known to each other. This was a case of recognition as opposed to identification of a stranger. On the issue of recognition, Madan J. in Anjononi & Others vs. Republic [1980] KLR had this to say;

> " .... This, however, was 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."

32. Similarly, in the case of Peter Musau Mwanzia vs. Republic [2008] eKLR this Court expressed itself as follows;

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend, or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question."

33. It is evident that the appellants were not strangers to Denis.

Accordingly, the learned Judge was not at fault in concluding that the appellants were positively identified/recognized as the persons responsible for the fatal injuries inflicted on the deceased when she stated that:

> " ...Although the light was blown out that was not done immediately. According to PW5 the assailants put out the lamp when they started beating the deceased. I am satisfied that PW5 had opportunity to see and recognize the assailants before one of them put out the lamp. He knew them very well. It is clear from his evidence that his father had not been in the house all along and only came back with the assailants..."

34. The prosecution having established the identity of the appellants as the people responsible for the fatal injuries inflicted on the deceased, the remaining ingredient to be determined is whether the appellant had malice aforethought when he killed the deceased.

35. In this regard, the crucial evidence was that of Dennis. He stated that he was in the house with the deceased when the appellants came in and started beating the deceased. After beating the deceased, they went outside and dug a hole near the door after which his father went to him and asked him where his mother was. Upon Dennis pointing to the deceased on the chair, the 1st appellant started screaming under the pretext that they had been attacked. The evidence of Dennis proved that the appellants were at the scene, assaulted the deceased, and caused her the injuries that resulted in the deceased's death. It is significant that Dennis emphasized that it was not the first time the 1st appellant assaulted the deceased. Further, Joshua, the area Senior Assistant Chief corroborated the evidence tendered by Dennis that he had on several occasions arbitrated disputes between the 1st appellant and the deceased. He also stated that the 3rd appellant and the deceased were never getting along. The appellants did not rebut the evidence tendered by the prosecution witnesses as they opted to remain silent on defence.

36. Given the vicious nature of the injuries that were inflicted on the deceased injuring her on the head leading to a depressed skull and worse of the digging of a hole in the house to conceal the evidence connotes malice aforethought. It is evident that the appellant and his siblings intended to cause either a grievous harm or death to the deceased and therefore malice aforethought was properly inferred under Section 206(a) and (b) of the *Penal Code*.

37. The appellant alluded to the contradictions and inconsistencies in the prosecution case. This Court stated in Joseph Maina Mwangi vs. Republic [2000] eKLR, that;

> "In any trial, there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 CPC, viz whether

such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

38. The contradictions and inconsistencies concerned the weapon used to assault the deceased, who administered the fatal blow, how the hole in the house was dug, who blew off the lamp, and the weapon each appellant used to assault the deceased. The aforesaid discrepancies are immaterial and do not affect the substratum or the main issue before the Court. In any event, they are curable under section 328 of the *Evidence Act*.

39. As regards the failure to call Joshua the witness who allegedly was the first one to arrive at the scene and who advised the 1st appellant to seek medical attention, the said witness only heard from the 1st appellant that they had been attacked by thugs and did not witness the same as such his evidence was hearsay. The duty of the prosecution when calling witnesses is set out in section 143 of the *Evidence Act*, which specifies that no particular number of witnesses are required to prove a fact. The Court of Appeal in Julius Kalewa Mutunga vs. Republic [2006] eKLR stated as follows:

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

40. We come to the irresistible conclusion that the evidence tendered in the trial court by the prosecution witnesses was sufficient to prove that the appellants assaulted the deceased on the day in question. In addition, there is absolutely nothing to attribute the failure to call the alleged witnesses to an ulterior motive by the prosecution. Therefore, whether or not Joshua was called to testify would have not in any way displaced the prosecution's case.

41. On the issue as to whether the sentence meted against the appellant was appropriate, in S vs. Malgas 2001 (1) SACR 469 (SCA), it was held at para 12 that:

> "A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence that the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling', or 'disturbingly inappropriate'."

42. This Court in Bernard Kimani Gacheru vs. Republic [2002] KECA 94 (KLR), expressed a similar opinion when it held 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, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, 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 stated is shown to exist."

43. In the instant case, the appellant committed a heinous and unprovoked offence against a defenceless woman. Having considered the circumstances under which the offence was committed, the brutality displayed by the appellants, and the traumatic effect of the heartless and fatal assault on the deceased in the presence of the deceased's young son, a jail term of 30 years imprisonment meted by the trial court was appropriate. There is nothing to persuade us that the learned judge's exercise of discretion was improper. The upshot is that this appeal lacks merit and is dismissed.

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

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

DEPUTY REGISTRAR