Oguma v Republic (Criminal Appeal 184 of 2019)
[2025] KECA 534 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 534 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 184 OF 2019

MSA MAKHANDIA, LK KIMARU & AO MUCHELULE, JJA

MARCH 21, 2025

BETWEEN

WILLIS OMONDI OGUMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the judgment of the High Court of Kenya at Kisumu, (F. A. Ochieng, J) dated and delivered on 29th May 2019 in Criminal Case No. 4 of 2018)

JUDGMENT

1. This is a first appeal by Willis Omondi Oguma ("the appellant"). He was initially charged, tried, and convicted on the information of murder contrary to section 203, as read together with section 204, of the *Penal Code* in the High Court of Kenya at Kisumu. The particulars of the information were that on 8th January 2018, at Koremo village, in Nyakach Sub-county within Kisumu County, the appellant, along with others not before court, unlawfully murdered Syprose Anyango Oywa.

2. Upon a thorough evaluation of the evidence tendered by the seven prosecution witnesses, the trial court, in a judgment dated and delivered on 28th May 2019, determined that the prosecution had established its case against the appellant beyond reasonable doubt. Consequently, it convicted the appellant and having considered his mitigation, the aggravating circumstances surrounding the commission of the offence, and the impact on the victim's family, the trial court imposed a sentence of 30 years' imprisonment. It is this judgment that the appellant is now before us on first appeal.

3. This being the case, we are duty-bound to re-evaluate, re-assess, and re-analyze the evidence on record so as to arrive at our own conclusions. This means that we must consider the evidence presented in the trial court, evaluate it independently, and draw our own conclusions. However, we should bear in mind that we did not see or hear the witnesses directly as they testified, and, therefore, make due allowance for that. See the often-cited case of Okeno vs. Republic [1972] EA 32.

4. Having ring-fenced our mandate, it is necessary to revisit the evidence that was laid before the trial court by the prosecution so as to put the appeal in the proper perspective. The prosecution called a total of seven witnesses to substantiate their case against the appellant. In summary, the prosecution's case centered around an altercation that occurred on 6th January 2018 between David Ochieng Oywa (PW1), ("David") the deceased's son, and Charles Oguma Odongo (PW6), ("Charles") the appellant's father. It arose when David utilized thorn tree branches to block openings in the fence around his mother's vegetable garden. The intention was to prevent livestock from entering the garden and devouring the crops, while Charles perceived differently the motive behind David's action.

   A verbal and physical altercation ensued between them, followed by a physical brawl, culminating in injuries to David's leg and Charles being pushed to the ground.

5. Upon receiving information about the incident in Kisumu, where he resided, the appellant, the son of Charles travelled to their home in Nyakach. On the morning of 8th January 2018, the appellant, accompanied by his nephew, Humphrey Omondi Otieno ("Humphrey"), approached the deceased's residence armed with a panga and rungu. Their and the deceased's homes shared a common boundary. He demanded that David, who had locked himself in his house, opens the door. Charles advised David not to open the door and to remain inside, which request David heeded.

6. PW2, Paul Odhiambo Owiti ("Paul"), was about 10 years old at the time and lived with the deceased. On the material day, he saw the appellant arrive at the deceased's home and demand that David comes out. When he refused, Paul saw the appellant enter the deceased's house, grab her by the neck, and "slap" her with the blunt side of the panga, causing her to fall. When PW2 inquired what the appellant was doing, the appellant cut him with the panga as well. The appellant, along with Humphrey and another person, then fled the scene on a motorbike.

7. PW3, Aphiline Adhiambo Kitondo, ("Aphiline") a co-wife to the deceased, lived about 100 meters away. On the material day, at around 6.00 am, she heard the appellant demanding that David comes out of his house. Despite standing about 10 meters away and outside the thorn fence, she could see what transpired inside the deceased's compound. She saw the appellant enter the deceased's house, held her by the dress, and "slapped" her with the panga, and when she fell down, he continued assaulting her.

8. PW4, Pamela Akinyi Owiti ("Pamela"), daughter of the deceased, corroborated the events of the material day. She saw and heard Charles telling the appellant to return home. Instead, the appellant, armed with a rungu and a panga, demanded that David comes out of the house and confront him. When he failed to do so, she then saw the appellant head for the deceased's house, got her out, and then assaulted her with a panga. When Paul intervened, he was equally assaulted by the appellant. She ran from the scene to seek assistance from members of the public. However, upon her return, she found Paul crying and her mother dead.

9. PW5, Ann Adhiambo Julu ("Ann"), the deceased's sister, identified the body for purposes of post-mortem examination.

10. Charles testified that he saw the deceased fall but did not witness what happened to her. He asserted that his son, the appellant, did not assault the deceased with anything. Later, he learned that the deceased had died, but he was unaware of the cause of her death. He confirmed that Paul was present at the deceased's home when the incident occurred.

11. PW7, PC Peter Mwangi, ("Peter"), the investigating officer, testified that upon receiving information about the incident, he went to the scene with other police officers. They found the deceased's body lying on the ground, about 3 meters from her house's doorstep. After conducting investigations, he established that the appellant and his cousin, Humphrey, had travelled from Kisumu to Nyakach with

the intent of avenging the assault on Charles by David. The investigations also disclosed that both the appellant's mother and Charles tried their best to control the appellant and stop the fracas, to no avail. After the deceased was assaulted, the appellant and Humphrey fled the scene on a motorcycle. Eventually, the appellant was arrested. That although police officers searched the appellant's house for the murder weapons, none were found.

12. Peter also testified that he was present during the post-mortem examination conducted by PW8 Dr. Agunda, ("Agunda"), who concluded that the cause of death was increased intracranial pressure due to epidural heamatoma caused by blunt head trauma. At this juncture, the appellant's counsel informed the trial court and the prosecution that the cause of death was not in dispute, leading to the admission of the post-mortem report into evidence by consent.

13. Put on his defence, the appellant opted for a sworn testimony. He confirmed that he was at the deceased's home on the material day to ask David why he had assaulted Charles. However, when Charles informed him that he had resolved the issue with David, he left. On seeing the appellant, however, the deceased started running away, and she then fell down and fatally injured herself.

14. As already stated, the trial court, in a judgment dated and delivered on 28th May 2019, found that the prosecution had proved its case against the appellant, convicted him, and sentenced him to 30 years of imprisonment.

15. Aggrieved by the decision, the appellant lodged this appeal on three grounds; to wit that the trial court erred in fact and in law by convicting and sentencing him when: the prosecution evidence did not support the charge; it based the conviction on circumstantial evidence; it imposed a sentence that was excessive, harsh, unconstitutional, and unlawful.

16. The appeal was canvased by way of written submissions with limited oral highlights. Ms. Awuor, learned counsel, appeared for the appellant, whereas Mr. Okango, learned Senior Principal Prosecution Counsel, appeared for the respondent.

17. Counsel for the appellant submitted that the prosecution witnesses' evidence contained contradictions regarding the events of the day in question. That David, who was the person the appellant had sought for in the homestead, testified that he had locked himself inside the house and did not open the door as demanded by the appellant, yet he testified that he saw the appellant assault the deceased outside the house; that whereas Paul testified that the deceased suffered a swollen neck and was bleeding from the hand, Aphiline, on the other hand claimed that she saw the appellant cut the deceased on her face, begging the question, where exactly was the deceased injured.

18. Despite attempts by various witnesses to testify about the appellant's contact with the deceased, the details of such contact differed among the witnesses, as counsel pointed out. That the trial court partially disregarded Charles's testimony, noting that as the appellant's father, his testimony may have been biased in favour of the appellant, though he testified that the deceased fell down and injured herself as a result. Furthermore, the postmortem report indicated that the cause of death was haematoma due to head trauma from a fall. Given the foregoing contradictions, counsel argued that the prosecution had not proved beyond reasonable doubt that the appellant caused the deceased's death.

19. Additionally, counsel contended that mens rea was not proved. That the evidence on record demonstrated that the appellant went to the deceased's home to confront David and not the deceased. The appellant, therefore, argued that the prosecution had failed to prove that the appellant had the necessary intent to harm or kill the deceased.

20. Regarding the sentence, counsel submitted that since the case was not proved beyond reasonable doubt, the conviction and sentence of the appellant was improper. He, therefore, prayed that the

appeal be allowed. That should this Court, however, uphold the conviction, counsel pleaded with us to interfere with the sentence imposed on the basis that it was manifestly harsh and excessive.

21. In response, Mr. Okango submitted that the testimonies by the prosecution witnesses were not contradictory and emphasized that the testimonies depended on several factors, including the time and location from where the witnesses observed the events. He acknowledged that while it was true that David had locked himself in the house, it was incorrect to suggest that he did not witness any of the events outside. That the record indicated that David heard what sounded like someone being slapped, and gathering courage, opened the door to see the appellant holding his mother and hitting her with a panga.

22. Additionally, Paul, the main eyewitness, was present with the deceased and witnessed the entire incident. He also became a victim when the appellant cut him with the panga as he tried to intervene. Aphiline, who observed the events from a distance of 10 metres or so, provided corroborating evidence to that of Paul. Counsel asserted that the testimonies of David, Paul, and Aphiline were consistent and corroborative, confirming that the appellant was at the deceased's home, dragged her outside her house, and hit her on the head with a panga. When the deceased fell to the ground, the appellant continued to assault her, as stated by Aphiline. Counsel further noted that although Charles's testimony, differed in some aspects with the evidence of other prosecution witnesses, Mr. Okango urged us to consider his evidence alongside that of David, Paul, and Aphiline and the fact that he was the father of the appellant and most likely biased in his favour.

23. Addressing the question of mens rea, counsel submitted that malice aforethought was proved two-fold. First, the appellant armed himself with a rungu and a panga and stormed David's and the deceased's homes, evincing intent to kill or cause grievous harm. Second, the grievous harm and fatal blow delivered by the appellant on the deceased were sufficient proof of malice aforethought pursuant to section 206 (b) of the *Penal Code*, hence mens rea.

24. Lastly, counsel submitted that since the appellant was convicted by a court of competent jurisdiction, the sentence imposed was legal and proper. He contended that the appellant's allegations of an excessive sentence were unfounded, as sentencing is a consequence of conviction. That the case of Francis Karioko Muruatetu (supra) did not completely outlaw the death sentence. That death sentence can still be imposed in suitable cases such as this one. He, therefore, urged us to uphold the conviction and sentence and dismiss the appeal.

25. Having carefully considered the record of appeal, submissions by respective counsel, our mandate, and the law, the two issues that call out for our determination are whether the prosecution proved the offence of murder against the appellant as required in law and whether the sentence imposed on the appellant was appropriate.

26. The appellant was charged with offence of murder pursuant to Section 203 of the *Penal Code*. The section provides inter alia:

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

27. For the offence of murder to obtain therefore, three elements which the prosecution must prove beyond reasonable doubt are:

(a) the death of the deceased and the cause thereof;

(b) that the accused committed the unlawful act which caused the death of the deceased; and (c) that the Accused did so with the malice aforethought. - See Nyambura & Others vs. Republic [2001] KLR 355.

28. There is no dispute at all as to the death of the deceased. Indeed, she died on the spot. This was confirmed through the testimonies of the six witnesses marshalled by the prosecution, who came to the scene after the fracas. The icing on the cake was, however, the testimony of Agunda, the seventh witness who performed the post- mortem on the body of the deceased and concluded that the cause thereof was increased intracranial pressure due to epidural heamatoma caused by blunt head trauma. It is also instructive to note that the appellant did not dispute the death and its cause, and that perhaps explains why the post-mortem report was admitted in evidence by consent without calling the maker thereof.

29. On the aspect of who caused the death, from the evidence on record, it is clear that the appellant was seen at the scene of crime. That much he concedes. He was armed with a panga and a rungu. Though the appellant concedes to have been armed, he claims to have been only armed with a rungu and not a panga. But this is neither here nor there. He was seen dragging the deceased from her house by the neck and hitting her with the flat side of a panga. This was witnessed by David, Paul, Aphiline, and Pamela. Their evidence was hardly controverted by the appellant. Indeed, when Paul intervened and asked the appellant what he was doing, the appellant did not spare him either, despite his tender age. He went ahead and cut him with a panga as well. He couldn't even listen to his mother's and Charles's entreaties to abort the mission he had embarked on as they had resolved the dispute.

30. All these events occurred in broad daylight. The appellant was well known to most of the crucial witnesses, in fact, they were very close relatives. Therefore, the identification and or recognition of the appellant could not have been in doubt.

31. On malice aforethought, section 206 of the *Penal Code* provides inter alia:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstance:-
>
> 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. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

32. Did the evidence establish the requisite malice aforethought on the part of the appellant? From the evidence of the various witnesses, including the appellant himself, he resided in Kisumu but left in the company of Humphrey to go to Nyakach immediately upon receiving information that Charles, his father, had been assaulted by David.

His intent and mission of the visit was obviously to avenge the assault.

33. The events leading to a scuffle between David and Charles happened whilst the appellant was away in Kisumu. From the evidence of Charles, the appellant, upon arrival at home, could not wait for the gate to be opened and went through the fence in order to get the weapons he used in the attack on the deceased and Paul. He even had the audacity to break the glass on the door of David's house in unbridled rage. As rightly put by the trial court, the gesture by the appellant to go through the fence in order to get the panga was a clear indication that he was in a haste to do something, which he was prepared to accomplish notwithstanding the barriers placed in his way.

34. Further, after getting the panga and the rungu, the appellant, in the company of Humphrey, went straight to the deceased's home and sought out David, who had locked himself in his house. Charles testified that he pleaded with the appellant to abort his mission, as everything was okay, to no avail. It is instructive that it was Charles who had restrained David from getting out of the house for fear of what would have ensued between the two. At this instance, we need to point out and which issue was also addressed at length by the trial court that considering, that Charles was the appellant's father, it was understandable that he found it difficult to explicitly say that he saw his son assault the deceased, as such testimony could easily have led to his son's conviction, hence the inadequacies in his evidence. Nonetheless, there was glaring evidence that after the appellant failed to get to David, he then turned his anger on the deceased, David's mother, held her by the neck, and fatally slapped her with the flat side of the panga severally. The actions of the appellant were obviously calculated to cause the death of or to do grievous harm to any person or even commit a felony. We entirely agree with the trial court's holding that the actions of the appellant manifested malice aforethought.

35. The appellant has advanced the argument that mens rea was not proved as his anger and actions were not directed at the deceased but David. In effect, the appellant appears to be arguing that he did not intend to kill or cause grievous harm to the deceased but to David, hence, no mens rea can be attributed to him. In effect, the appellant is saying that the death of the deceased was but mere collateral damage, and he should, therefore, not be held to account for the death. However, this submission is unsustainable and supplanted by the clear provisions of section 206 (a) and (b) of the *Penal Code*, which reiterate that malice aforethought can be inferred where there is:

> "... 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..... 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."

36. Given all the foregoing, we are satisfied, just like the trial court, that malice aforethought was established against the appellant beyond peradventure.

37. The appellant alluded to the contradictions and inconsistencies in the prosecution's 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."

The contradictions and inconsistencies concerned the account of events as to how they unfolded from the witnesses, David, Paul, and Charles, and where and how the deceased was injured. Having gone

through the record, we are satisfied, just like the trial court, that the alleged contradictions and or inconsistencies were minor, inconsequential, and did not go to the root of the prosecution case. In any event, they are curable under section 382 of the *Criminal Procedure Code*. At any rate, as can be expected in such circumstances, the prosecution witnesses narrated what they saw in their perspective and the position they were as they saw the events unfolding. It will not be in the ordinary course of events that the said prosecution witnesses had exactly the same perspective. Lastly, where and how the deceased was injured is a non-issue considering that the appellant did not contest the cause of death and allowed the post-mortem report to go into evidence by consent obviating the necessity to call the maker thereof.

38. In assessing the appropriateness of the sentence imposed on the appellant, it is instructive to consider the principles articulated in the case of S vs. Malgas [2001] (1) SACR 469 (SCA). At paragraph *12*, the court held 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'."

39. Similarly, this Court in Bernard Kimani Gacheru vs. Republic [2002] KECA 94 (KLR) expressed a comparable view, stating:

> " 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."

40. In the present case, the appellant committed a heinous and unprovoked attack against a defenceless woman. The circumstances under which the offence was committed, the brutality displayed by the appellant, and the traumatic impact of the heartless and fatal assault on the deceased in the presence of young Paul were thoroughly considered by the trial court. Consequently, the imposition of a 30-year imprisonment term by the trial court was appropriate in our view. There is nothing to suggest that the trial court exercised its discretion in sentencing improperly.

41. In the result, this appeal is unmeritorious and is accordingly dismissed in its entirety.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR