Osoro & 2 others v Republic (Criminal Appeal 5 of 2019)
[2025] KECA 544 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 544 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 5 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

MARCH 21, 2025

BETWEEN

EVANS SHEM OSORO ..... 1ST APPELLANT

ROBERT MASEA GEDION ..... 2ND APPELLANT

DENNIS OINO ONDABU ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kisii (D.S. Majanja, J) Dated 6th and 10th December, 2018 in Kisii HC. Criminal Case No. 4 of 2018)

JUDGMENT

1. Evans Shem Osoro, Robert Masea Gedion and Dennis Oino Ondabu, herein, 1st, 2nd and 3rd appellants respectively, were arraigned before the High Court at Kisii for the offence of murder. They were alleged to have murdered Evans Okerosi Mokora (herein the deceased) on 1st January, 2018, at Nyakenga village in Kisii County.

2. During the trial, six witnesses testified for the prosecution. These were James Maobe Ondabu (James), in whose home the appellant was attacked; Makora Mogere (Mogere) father to the deceased, whose name was wrongly indicated in typed proceedings as Rogers; Janes Nyanchama (Janes) and her daughter Mary Sabina Orwaro (Mary) who were asleep in the kitchen when the deceased burst into the kitchen seeking for refuge; Dr. Peter Morebu Momanyi (Dr. Momanyi), who conducted a postmortem examination on the body of the deceased; and Inspector Nicholas Kemboi Tanui (IP Tanui), an officer then attached to CID Kenyenya who investigated the case. When put to their defence, each appellant gave an unsworn statement and called no witness.

3. The learned Judge, upon considering the evidence, delivered a judgment in which he found, first, that the death and cause of death of the deceased was established through the autopsy that was conducted on the body of the deceased; that the evidence of Dr. Momanyi and the autopsy report showed that the body had deep cut wounds on the right lateral distal part of the right leg, with a fracture of the right tibia and fibula bones; and that this led to the conclusion that the deceased died as a result of severe bleeding from the injuries.

4. Second, the learned Judge found that all the three appellants were identified by James, Mogere, Janes and Mary, as persons who participated in assaulting the deceased, the 1st appellant standing by, as the 2nd and 3rd appellants cut the deceased with pangas. Third, that the eye witnesses all knew the appellants well as they come from the same village and were able to identify them through recognition. Fourth, that the evidence of the eye witnesses put the appellants at the locus in quo, assaulting the deceased, and therefore, their defences were negated; and finally, that the appellants had malice aforethought because their action of cutting the deceased with pangas was calculated to exact revenge and cause the deceased grievous harm or death within the meaning of Section 206 of the *Penal Code*. The learned Judge therefore found the appellants guilty of the offence as charged, convicted them and sentenced each to serve twenty years' imprisonment.

5. The appellants being aggrieved by the judgment of the High Court, lodged an appeal against their conviction and sentence. In the memorandum of appeal the appellants raised six (6) grounds of appeal which can be summarized as follows:

   i. the prosecution did not prove the case beyond reasonable doubt;

   ii. the prosecution's evidence was inconsistent and full of contradictions;

   iii. the learned Judge erred in convicting the appellants for an offence which was committed by a mob;

   iv. the learned Judge erred in convicting the 3rd appellant for an offence he never took part in; and

   v. the learned Judge did not subject the entire evidence to exhaustive evaluation thereby occasioning miscarriage of justice.

6. The appellants have filed written submissions in support of the appeal through their advocate, M/S Ogega Advocates. They argue that the testimony of the prosecution witnesses was inconsistent, contradictory and not sufficient to prove the case against them; that it was not clear who inflicted the fatal blow; and that the learned Judge having found that the 1st appellant was not part of the group that attacked the deceased, he ought not to have convicted 1st appellant. The appellants pointed out inconstancies in the evidence of James, Mogere and Mary, maintaining that there were material contradictions in the evidence of the witnesses, that went to the strength of the prosecution case. The appellants relied on *John Mutua Musyoka -v- Republic* [2017] eKLR, for the proposition that the inconsistencies should be resolved in their favour.

7. Further, the appellants contended that the prosecution failed to avail material exhibits such as the "panga" and the photography evidence, and therefore, the burden was shifted to the appellants. In addition, it was submitted, relying on *Solomon Mungai & others - v- R.* [1965] EA 782, that common intention was not proved particularly in regard to the 1st appellant, whom the witnesses did not see with any weapon. The appellants cited *Dracaku s/o Afiya & another -v- R*. [1963] EA 363, for the proposition that for common intention to be achieved, the harm must be part of the same transaction.

8. In regard to sentence, the appellants argued that the learned Judge did not consider their mitigation and the sentence of twenty years imprisonment that was imposed upon them, was unduly harsh and excessive. The appellants relied on the Supreme Court's direction in *Muruatetu & another -v- R.; Katiba Institute & 4 others (Amicus curiae)* [2021] KESC 31 (KLR), and urged the Court to allow the appeal or in the alternative, reduce the charge against the 2nd and 3rd appellants to manslaughter and take into consideration the period already served.

9. The respondent also filed written submissions which were duly prepared by Mr. Joseph Kimanthi, a Senior Assistant Director of Public Prosecutions in the Office of the Director of Public Prosecutions (ODPP). The respondent submitted that proof of death and cause of death of the deceased was established through the evidence of Dr. Momanyi who performed the postmortem examination.

10. As regards the identification of the appellants, the respondent submitted that James, Mogere, Mary and Janes, all testified that they knew the appellants as they come from the same village; that they recognized the appellants as having been part of the mob that was pursuing the deceased on the material night; that James was candid regarding the role of each of the appellants, and the close interaction and length of time he spent with the appellants, was sufficient to enable him recognize them positively, without making a mistake; that Mary and Janes were also able to see and recognize the appellants as they broke the door and pulled the deceased out; and that although the 1st appellant did not injure the deceased, he was among the persons who chased the deceased with the sole purpose of inflicting injuries on him. In this regard, the respondent relied on *Solomon Munga -v- Republic* [1965] EA 363.

11. On malice aforethought, the respondent submitted that the appellants inflicted injuries on the deceased, which injuries they knew or ought to have known were likely to cause grievous harm or death to the deceased; that the appellants' actions were calculated to exert revenge, as they chased the deceased, broke the door to James kitchen, dragged him out and proceeded to cut him with panga, leaving him bleeding to his death; and that consequently, malice aforethought was established under Section 206 of the *Penal Code*. The respondent submitted that the prosecution evidence was water-tight and established beyond reasonable doubt that the appellants committed the offence as charged.

12. In regard to failure to produce the panga as an exhibit, the respondent submitted that there was clear evidence from James, that the deceased was cut with a panga and this was consistent with the evidence of Dr. Momanyi. The respondent cited *Godfrey Wafula Simiyu -v- Republic* [2021] eKLR, for the proposition that there was no requirement in law for a murder weapon to be produced in criminal trials, and that failure to produce the same was not fatal to the prosecution case.

13. On sentence, the respondent argued that the sentence of twenty years' imprisonment was neither excessive, nor harsh given the charge that the appellants faced. The respondent urged the Court to find the appeal without merit and dismiss it.

14. This being a first appeal, the Court has a duty to revisit the entire evidence that was before the trial court, re-evaluate, analyze it, make its own findings, and come to its own conclusions in light of the law.

    Further, the court has to bear in mind that, unlike the trial court, it did not have the benefit of observing the demeanor of the witnesses and the appellant during the trial, and must therefore give allowance for this.

15. This duty was clearly stated in *Okeno v. Republic* [1972] EA 32, 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 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."

16. The appellants were charged with the offence of murder.

According to Section 203 of the *Penal Code*, the elements of the offence of murder that is required to be proved to establish the charge, are the fact that the deceased died; the cause of death of the deceased; the fact that the cause of death arose from an unlawful act or omission on the part of the accused person; and the fact that the accused had malice aforethought in committing the act or omission.

17. In *Anthony Ndegwa Ngari v Republic* [2014] KECA 424 (KLR), the Court (Visram, Koome & Odek, JJA), identified the three elements of the offence of murder as:

i. the death of the deceased and the cause of that death;

ii. that the accused committed the unlawful act which caused the death of the deceased;

iii. that the accused had the malice aforethought. (See *Nyambura & others -v- Republic* [2001] KLR 355.

18. Having considered the record of appeal, the respective submissions, and the law, the issues that we discern for our determination are three. This is, whether the learned Judge properly considered and evaluated the evidence which was before him; whether there was sufficient evidence to sustain the conviction of each of the appellants; and whether the sentence meted out on the appellants was manifestly harsh and excessive.

19. The prosecution evidence before the trial court, was that, on the material night, James heard loud voices and saw a mob chasing the deceased. The deceased ran into the home of James and entered into the kitchen where Janes the wife of James and Mary, his daughter were asleep. The deceased closed the door behind him but the mob followed, broke open the door, and pulled the deceased out. Among the mob, James was able to identify the three appellants who are known to him as neighbours. He inquired what was happening and they informed him that the deceased had beaten the father to the 3rd appellant on the face with a panga and grazed his ear. He saw the 2nd and 3rd appellants who were armed with pangas attack the deceased and cut him with the pangas. James noted that the 1st appellant who was also in the group stood by as the attack took place.

20. Janes and Mary also identified the three appellants as having been in the mob that broke into the kitchen and pulled the deceased out. They said they were woken up by noises only to find that the deceased had entered the kitchen. As the mob broke into the kitchen, Janes and Mary ran out of the kitchen leaving the deceased inside. When they came back in the morning, according to Mary, they found the body of the deceased outside and according to Janes, the body had already been taken to the mortuary.

21. Mogere, the deceased's father, received information of the attack.

As he was going towards the home of James, he met the 1st appellant and his mother who were each carrying a panga as well as his sister who was holding a piece of wood. He talked to them but they ignored him. When he went into the home of James, he found the deceased bleeding but he was able

to talk. Mogere asked the deceased who had injured him, and the deceased informed him that he was injured by one Ouru and the 2nd appellant. Thereafter, the deceased was unable to talk further and subsequently succumbed to his injuries. Inspector Tanui visited the scene and found the body of the deceased still at the home of James. He organized for photographs to be taken and the body was then moved to the mortuary. Subsequently, Inspector Tanui arrested the 1st appellant, and later 2nd and 3rd appellants were also arrested in Nairobi.

22. In their unsworn defences, each appellant denied having committed the offence and stated they knew nothing about the murder. The 1st appellant claimed he had just come back from Trans- Mara when he was arrested, while the 2nd appellant claimed on the material night, he was at a kesha [overnight fellowship] in his church, and came to learn of the death of the deceased the next morning. He travelled to Nairobi a few days later and was arrested in Nairobi about two weeks later. The 3rd appellant explained that on the material night he came back home and found his father having been injured. He took his father to Hospital, and it was when he came back at 4.00pm that he learnt that the deceased had died. The next day the police arrested his father. A few days later he went to Nairobi from where he was later arrested.

23. The fact that the deceased died is not substantially in dispute.

James, Mogere, and Inspector Tanui, all testified that they saw the deceased's dead body, and their evidence is corroborated by Dr. Momanyi who examined the body of the deceased. The cause of death is also clear from the evidence of the eye witnesses who all testified that the deceased was assaulted and his body had cut wounds. The issue is how did the deceased sustain his injuries? Was any of the appellants involved?

24. The evidence on record points to the deceased having met his death at the hands of a mob who included the appellants herein. The three prosecution eye witnesses testified that the deceased was being chased by the appellants and others. James met the mob while chasing the deceased and even spoke to them before they entered his house. Although it was dark, James spoke to them beseeching them not to attack the deceased. Upon not finding the deceased in the house, the mob including the appellants moved to the kitchen of James, broke the door, and dragged the deceased out of the kitchen. James was categorical that he saw the 2nd and the 3rd appellants cut the deceased on the back and leg with pangas which evidence was consistent with the postmortem report that was produced as an exhibit. He also swore that 1st appellant was present during the attack.

25. Janes and Mary were able to identify the appellants among the mob with the help of the moonlight, as the mob struggled to pull out the deceased at the door. As Janes and Mary escaped from the Kitchen, they recognized the three appellants who were well known to them as neigbours. The eye witnesses therefore each saw and identified the three appellants through recognition in close proximity. As was stated in *Anjononi & Others v. Republic* [1976-80] 1 KLR 1566:

> "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."

26. The learned Judge, in analyzing the evidence stated thus:

> "PW3 and PW4 scrambled for safety while the accused dragged the deceased from the kitchen. PW1 clearly saw the deceased being cut. He explained that the 1st accused was standing by the side, the 2nd accused had a panga with which he cut the deceased on the back

and the 3rd accused cut the deceased on the leg. All this evidence leaves no doubt that the accused pursued and assaulted the deceased resulting in severe injuries leading to his death."

27. We totally agree with the learned Judge. The evidence is clear that the appellants were not only part of the mob that attacked the deceased but also actively participated in assaulting the deceased. We are alive to the fact that there were some inconsistencies and contradictions in the evidence of the prosecution witnesses. For instances, while James said that only the 2nd and 3rd appellants were armed with pangas, Mogere stated that he met the 1st appellant and his mother both being armed with pangas. It is apparent that the two witnesses were talking of the 1st appellant being in different places. While the evidence of James related to his presence at his home, the evidence of Mogere related to his meeting the 1st appellant and his mother as they were going away. There was also the evidence of Janes and that of Mary as to whether the body of the deceased was at the home of James when they came back, or whether it had already been taken to the mortuary. Mary also contradicted herself first stating that she could not tell who was beating the deceased, and then later saying she was able to identify the three appellants.

28. The Court of Appeal of Uganda in *Twehangane Alfred -v- Uganda*, Criminal Appeal No. 139 of 2001, 2003 UGCA No. 6, in a dicta which was adopted by this Court in *Erick Onyango Ondeng - v- Republic* [2014] KECA 523 KLR, the Ugandan Court stated:

> "With regard to contradictions in the prosecution case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."

29. In *Philip Nzaka Watu -v- Republic* [2016] eKLR, this Court, (Makhandia, Ouko and M'Inoti, JJA) had this to say on the issue of contradictions in evidence:

> "It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.
>
> However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

30. The contradictions adverted to were minor contradictions which did not shake the overwhelming evidence adduced by the prosecution witnesses that all the three appellants were part of the mob that chased and attacked the deceased. Nor do the contradictions point to any untruthfulness on the part of any of the witnesses. We are satisfied that the contradictions do not detract from the fundamental issues regarding the deceased having been attacked by a mob and the three appellants having been part of the mob.

31. On malice aforethought Section 206 of the *Penal Code*, provides that malice aforethought may be inferred in any of the following circumstances:

> "(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. In *Tubere s/o Ochen v. Republic* [1945] 12 EACA 63 the court addressing malice aforethought stated:

> "The weapon in possession of the accused while carrying out the intention, the manner in which it was used to strike the human being whether one-off blow or violent multiple blows, the conduct of the accused in fleeing from the scene afterwards, the permanency or dangerous severity of the bodily harm, and that cumulatively the death of the deceased must ensue from the bodily harm intentionally inflicted."

33. Similarly, in *Omar v Republic*, [2010] 2 KLR 19, this Court, (Bosire, Waki & Aganyanya, JJA), at page 29, applied the principle in Section 206 of the *Penal Code* as follows:

> "So by the appellant hitting the deceased on the neck with a bottle, he must have intended to cause 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".

34. The fact that the appellants chased the deceased while armed with pangas, and cut the deceased with pangas, causing him severe injury is an indication that they had an intention to cause him grievous harm or death. Malice aforethought can therefore be inferred under Section 206(a) of the *Penal Code*.

35. The appellants took issue with the failure by the prosecution to produce the weapon that was allegedly used in the commission of the offence. The evidence of James remained firm and unshaken in cross-examination, that both 2nd and 3rd appellants were armed with pangas, and that he saw them cut the deceased with the pangas. The postmortem report confirmed that the cause of death was severe injury due to cut wounds. Thus, there was consistency that the probable weapons used in inflicting the injury on the deceased were pangas. Although no such weapon was produced in evidence, there is no mandatory requirement in law for a murder weapon to be produced in criminal trials. As a matter of fact, many a time the weapon is never recovered. Whereas it might have been important to produce the murder weapon, in this case, there was no evidence that any of the murder weapons were recovered, and the failure to produce the same was not fatal to the prosecution case.

36. We find support in *Karani v. Republic* (2010) 1 KLR 73, where the evidence regarding the production of the alleged weapon having been vitiated by the irregular production of the exhibit, this Court (Tunoi, Bosire & Onyango Otieno, JJA) stated:

> " The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit."

37. The failure to produce the murder weapon was not fatal to the conviction as there was sufficient evidence that pangas were used in inflicting injuries on the deceased, and therefore, the existence of the pangas as the murder weapons was established.

38. It was contended that since the evidence of James was that the 1st appellant was not armed, the learned Judge erred in convicting him of the offence. In this regard, Section 21 of the *Penal Code* defines common intention as arising:

> " When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

39. In *R. v- Tabulayenka s/o Kirya* (1943) EACA 51, the former Court of Appeal for Eastern Africa stated:

> " The common intention may be inferred from their presence, their actions, and the omission of either of them to disassociate himself from the assault."

40. In *Njoroge -v- Republic* [1983] KLR 197 at page 204, this Court, (Madan, Potter & Chesoni, JJA), addressing the issue of common intention expressed themselves as follows:

> " If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly."

41. The evidence showed that the 1st appellant was part of the mob that chased the deceased and dragged him out of the kitchen in the home of James. It is also evident that although the 1st appellant was not armed, he stood by and did not disassociate himself from what was going on. We find that the 1st appellant had a common intention with the 2nd and 3rd appellants who inflicted the fatal blow. Clearly, the 1st appellant was on the same mission as the 2nd and 3rd appellants who assaulted the deceased, and since death was a logical consequence of the attack on the deceased, the 1st appellant must also be taken to have had malice aforethought and is therefore guilty of the offence of murder.

42. The appellants contended that the sentence of twenty years imprisonment imposed upon them was harsh and excessive, while the respondent on their part maintained that the sentence was lenient. In *Bernard Kimani Gacheru -v- Republic* [2002] KECA 94 (KLR), this Court (Chunga, CJ & Shah & Bosire, JJA) held that sentencing is the discretion of the trial court, and an appellate court ought not to interfere with the sentence unless that sentence is manifestly excessive taking into account all the

circumstances of the case, or the trial court overlooked some material factor, or took into account some irrelevant factors, or acted on a wrong principle.

43. The appellants have not faulted the learned Judge for failing to consider some material factors or taking into account irrelevant factors or acting on wrong principles. The appellants were convicted of the offence of murder for which the maximum sentence provided under law is death. The Supreme Court in *Francis Karioko Muruatetu & another -v- Republic* [2017] eKLR, has provided a lifeline to convicts by declaring the mandatory death sentence unconstitutional, thereby opening the door for courts to exercise their discretion and impose a sentence other than death sentence where the circumstances are appropriate.

44. In this case, the learned Judge in sentencing the appellants took into account the circumstances in which the offence was committed which involved, forcefully removing the deceased out of the kitchen and cutting him with pangas. The learned Judge also considered the fact that the appellants were first offenders and were young persons. In his wisdom, the learned Judge considered the sentence of twenty years imprisonment to be appropriate for each appellant. Given the circumstances, the learned Judge properly exercised his discretion, and the sentence that was imposed on each of the appellant was neither harsh nor excessive. Consequently, there is no justification for this Court to interfere with the sentence.

45. The upshot of the above is that, we find no merit in this appeal.

We uphold the conviction and sentence imposed upon each appellant, and dismiss the appeal in its entirety.

Those shall be the orders of this Court.

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

HANNAH OKWENGU

.....

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