Naman v Republic (Criminal Appeal 176 of 2019)
[2025] KECA 476 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 476 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 176 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

MARCH 7, 2025

BETWEEN

SIMON MUSAMBAI NAMAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Kakamega (Sitati, J) delivered by Musyoka, J. on 10th April 2019 in HCCRA No. 42 of 2012)

JUDGMENT

1. Simon Musambai Naman, the appellant herein, was arraigned before the High Court at Kakamega for the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. According to the information presented to the High Court, the appellant was alleged to have murdered Hellen Mboka Naman, on 1st November, 2012, at Emariku village, Kisa South Location in Khwisero District within Kakamega County.

2. During the trial, six witnesses testified for the prosecution. These were PW1 – Peter Mudogo Naman (Peter), PW2 – Cleophas Ocholi (Ocholi), PW3 – Edward Amutsama Otieno (Edward), PW4 – Lusiana Ibrahim Nziwa Amukasa (Lusiana), PW5 - Dr. David Akaliche Adori (Dr. Adori) and Pw6 – Chief Inspector Lilian Otieno (IP Lilian). When put on his defence, the appellant gave a sworn statement and called no witness.

3. The prosecution evidence was, briefly, as follows. The appellant is a son to Hellen Mboka Naman (herein the deceased), and a brother to Peter. On the material day, at around 8am, Lusiana had gone to the deceased's home to buy milk. She found the deceased milking her cow while sitting on a low stool. Lusiana then saw the appellant approach from the lower side of the deceased's compound. The appellant who was carrying an axe, went straight to where the deceased was milking the cow, and cut her on the head with the axe. On seeing what had happened, Lusiana screamed as she ran towards the

road, with the appellant hot in pursuit. Some neighbours responded to Lusiana's screams, and when the appellant saw them coming, he turned back and went to the home.

4. Edward, a village elder, was one of those who responded to Lusiana's screams. He found the deceased unconscious and contacted the Assistant Chief, who also went to the home and noted that the deceased had a cut wound. He arranged for the deceased to be taken to the hospital but she died on the way. IP Lilian and two of her colleagues proceeded to Musalaba Police Post, where they found that the Assistant Chief had already reported the matter. The appellant, who had presented himself at the police station, was also in custody. IP Lilian went to the home of the deceased where she noted that the body had cut wounds. She interrogated Lusiana and took statements. IP Lilian arranged for the appellant to be taken to hospital for mental assessment. She then charged him with the offence.

5. Peter identified the body of the deceased to Dr. Oluga at the mortuary at Vihiga County Hospital. Dr. Oluga performed a postmortem examination on the body. He noted that the body had blood stains on the left side of the head at the junction of the parietal and occipital areas. The body had also a depressed skull fracture at the back of the head involving both the parietal and occipital skull. There was also subdural hematoma below the subdural fracture. Dr. Oluga concluded that the deceased's cause of death was severe head injury, characterized by subdural hematoma, brain laceration and depressed skull fracture secondary to trauma. The report of Dr. Oluga was produced in evidence by Dr. Adori, as Dr. Oluga was at the material time away undertaking further studies at the University of Nairobi.

6. In his sworn statement, the appellant denied having killed his mother. He explained that he had spent the night at the funeral of one Tabitha Ocholi. He went back home at about 10 am and found neighbours and vigilante standing at the gate. He was assaulted by the vigilantes as a result of which he escaped and went to Musalaba Patrol Base. He was detained because some people alleged he had assaulted his mother.

7. He stated that Lusiana had a perennial grudge against him over a land boundary, and that she had lied to the court. Under cross examination he stated that he did not know how his mother died as he was not there when she died, nor did he participate in causing her death. He denied surrendering himself to the police, and claimed that he was being chased when he entered the police station. He denied having cut his mother with an axe.

8. Upon evaluating the prosecution and defence evidence, the learned Judge, (Sitati, J.), found the charge against the appellant proved to the required standard, convicted him of the offence of murder and sentenced him to forty years imprisonment. Being aggrieved, the appellant preferred the present appeal against conviction and sentence.

9. In a memorandum of appeal filed through his advocate, the appellant raised eleven grounds. The grounds may be summarized as faulting the learned Judge for shifting the burden of proof to the appellant and lowering the standard of proof to the appellant's detriment; failing to consider the elements of mens rea and actus reus as crucial ingredients of the offence; making inferences and drawing conclusions using extraneous matters; relying on the evidence of Lusiana as the only identifying witness; failing to consider the appellant's defence of alibi; and imposing a sentence on the appellant that was in the circumstances manifestly excessive.

10. The appellant filed written submissions in support of his appeal through his counsel, Millicent Lukasile, Advocate. In the submissions, it was argued inter alia that the learned Judge did not properly interrogate the quality if any, of consistency and strength of prosecution evidence but instead, made deliberate effort to synchronize and harmonize the prosecution evidence; that malice aforethought as provided under Section 206 of the *Penal Code* was not established; that Dr. Adori in his evidence

conceded that it was possible for the injuries observed on the deceased to occur if a person fell with force on a hard surface; and that there was no evidence of a report regarding the murder weapon.

11. Further, it was submitted that the evidence of Lusiana who was the sole identifying witness was not reliable; that in her evidence she indicated that the appellant had a grudge with the deceased but this was not consistent with the evidence of Peter who did not talk of any grudge between the deceased and the appellant; and that there was no other witness among the people whom Lusiana claimed responded to her screams who came to testify.

12. In addition, the evidence of the Assistant Chief who claimed that the deceased died on her way to the hospital was not consistent with the evidence of other witnesses who stated that the deceased was never taken to hospital. Joseph Maina Mwangi -vs- Republic - Criminal Appeal No. 73 of 1993, was relied on, the Court being urged to note the discrepancies in the prosecution case and find that they were prejudicial tothe appellant. Roria -vs- Republic [1967] EA 583, was also cited, the Court being urged not to rely on the evidence of Lusiana. It was contended that the prosecution did not prove its case beyond reasonable doubt.

13. The responded also filed written submissions through learned counsel C. Kagai, from the Office of the Director of Public Prosecutions (ODPP). It was submitted that the appellant was convicted on the basis of the evidence of six witnesses who included an eye witness who saw him cut the deceased with an axe; that there was clear evidence that the deceased had a cut on the head and died as a result of that injury, and therefore, the death of the deceased was proved.

14. Further, it was argued that the evidence of Lusiana confirmed that the appellant deliberately cut the deceased on the head; that the fact that the appellant cut the deceased on the head with an axe was evidence of malice aforethought; and that the evidence of the single eye witness is enough to sustain the conviction of the appellant, as he was properly identified by Lusiana who knew him well.

15. Relying on Republic -vs- Tubere s/o Ocheng [1945] 12 EACA 63, it was submitted that malice could be inferred from the circumstances. As regards the appellant's contention that motive was not proved, Joseph Wambirwa Mwanthi -vs- Republic – Criminal Appeal No. 63 of 2005 (CA Nyeri), was relied on for the proposition that motive is not essential to prove a crime.

16. On the alleged shifting of the burden to the appellant, it was submitted that the respondent availed all witnesses and there was no scenario where the burden was shifted to the appellant. Similarly, as concerns the appellant's alleged alibi, it was submitted that the same was properly rejected as an afterthought as it was only put forward during the defence and there were no witnesses called to confirm that the appellant arrived home at 10am after the assault. Victor Mwendwa Mulinge -vs- R. [2014] eKLR, was relied upon.

17. On sentence, it was maintained that the sentence of forty years imposed on the appellant was in accordance with the sentencing guidelines and the circumstances of the case. The Court was therefore urged to dismissed the appeal.

18. This being a first appeal, this Court is obligated to re-evaluate and analyze the evidence in order to arrive at its own findings and draw its own conclusions. In Okeno v R, [1972] E.A. 32, the Court explained the Court's duty 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 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."

19. Having carefully considered the record of appeal, the contending submissions of the parties, the authorities cited and the law, and bearing in mind the Court's mandate as afore stated, the issues that arise for determination are whether the evidence established that the appellant caused the injury that resulted in the death of the deceased, if so, whether he committed the act or omission with malice aforethought; whether the evidence was sufficient to sustain a conviction for the offence of murder, and if so, whether the appellant's sentence was harsh or excessive in the circumstances.

20. The appellant was charged and convicted of the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. Section 203 provides as follows:

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

21. It is trite that for the prosecution to sustain a conviction on a charge of murder, the prosecution must prove the fact and cause of death of the deceased person; that the death arose as a result of an act or omission on the part of the accused person; and that the accused person committed the act or omission with malice aforethought. In Anthony Ndegwa Ngari v Republic [2014] KECA 424 KLR, the Court of Appeal (Visram, Koome & Odek, JJA) stated as follows:

> " 11. For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought. See Nyambura & others -vs- Republic [2001] KLR 355."

22. In the instant appeal, the fact of the death of the deceased is not in doubt. Lusiana testified that she saw the appellant cut the deceased with an axe on the head, while the Assistant Chief testified that he organized for a vehicle to take the deceased to hospital but the deceased died on the way to hospital. IP Lilian on her part testified that she found the body of the deceased with cuts on the head. Any doubts concerning the death of the deceased is dispelled by the evidence of Peter who identified the body at the mortuary to Dr. Oluga who performed the postmortem examination.

23. The postmortem report which was produced by Dr. Adori confirmed that the deceased died as a result of the head injuries. Although the appellant disputed the cause of death due to Dr. Adori's concession that the injuries could also been caused by a fall on a hard surface, that speculation is ruled out by the evidence of Lusiana who saw how the deceased sustained her injury.

24. In her judgment, the learned judge addressed the evidence of Lusiana as follows:

> " On the second ingredient as to whether it was the accused who committed the unlawful act which caused the death of the deceased, Luciana gave a vivid account of what happened that morning. She gave a clear account of the events of that day. Her testimony was not shaken even during intense cross examination. She remained consistent all through. Everything

happened in the morning and she was able to see the accused with the axe. She told the Court that she knew the accused very well and at first she thought that the accused was going to cut a tree. But she was shocked when the accused attacked his mother as the mother sat on a low stool milking her cow. She said the attack was from behind. She ran in shock shouting that ''Simon has killed his mother.'' Accused chased her. Her screams attracted Edward, the village elder who rushed to the scene where he found the deceased's body lying on the ground. The account by Lusiana clearly proved that the accused was at the scene and that indeed he attacked the mother with an axe. I have no reason to doubt her testimony though she was the only identifying witness. I have no doubt in accepting and relying on the evidence of Lusiana a single identifying witness for the prosecution. She impressed the Court as a truthful and straightforward witness.''

25. The appellant faults the learned judge for convicting him based on the evidence of a single identifying witness. There is no doubt that the appellant's conviction was on the basis of the evidence of Lusiana, a single identifying witness. The law requires the trial court when dealing with the evidence of a single identifying witness, to caution itself and carefully scrutinize the evidence of the single witness and only convict if satisfied that the witness is telling the truth and that the evidence is free from the possibility of error or mistake.

26. The locus classicus in identification by a single witness is Abdalla Wendo v Republic (1953) 20 EACA 166, where the Court stated that:

> " Subject to certain well-known exemptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification; especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

27. Similarly, in Ogeto v Republic [2004] KLR 19, it was stated as follows:

> " It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.

28. This Court (Karanja, Mohammed & Kimaru, JJA), in Mbaabu & 2 others v Republic [2024] KECA 1292 (KLR), stated as follows:

> " 43. The unassailable identification of an accused person is a principle aspect of any offence. It plays a critical role in the criminal justice process. Once eye witness testimony is lawfully obtained, preserved and presented and erringly links the accused to the commission of the offence, it is likely to be the most significance prosecution evidence available.
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> 44. Further, we are fully aware that there is no formula applicable when it comes to consideration of the credibility of a single identifying witness. The trial court must weigh the evidence adduced, consider its merits and demerits and

determine whether or not it is credible notwithstanding that there may be shortcomings, defects or contradictions in the evidence.

45. In Hassan Juma Kanenyera & others -vs- Republic [1992] (TLR 100 CA) it was stated that it is a rule of practice not of law, that corroboration is required of the evidence of a single identifying witness made under unfavourable conditions. Further, that the rule does not preclude a conviction on the evidence of a single witness if the court is fully satisfied that the witness is telling the truth."

29. Lusiana, who knew the appellant well, was able to identify him as the assailant. The appellant was well known to Lusiana as a neighbor, a son to the deceased, and her grandson. The incident occurred at around 8am when there was sufficient light. Moreover, the identification was one of recognition as opposed to the identification of a stranger. As stated in Anjononi & Others vs. Republic [1980] KLR 59, identification by recognition is more satisfactory, reassuring, and more reliable because it depends upon personal knowledge of the assailant. The trial Judge properly considered the evidence of Lusiana, and we are satisfied that Lusiana spoke the truth that she saw the appellant hit the deceased with an axe on the head. The evidence given by Lusiana placed the appellant at the scene of the murder and ruled out the appellant's alibi. It established that the injury which resulted in the deceased's death was caused by the appellant.

30. On malice aforethought, Section 206 of the *Penal Code*, identifies the following circumstances as constituting malice aforethought.

"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."

31. Lusiana saw the appellant cut the deceased on the head with an axe. The attack was completely unprovoked, and the weapon used demonstrated an intent to cause death or grievous harm to the deceased. In Barisa v Republic [2024] KECA 219 (KLR) this Court (Makhandia, Murgor & Odunga, JJA) stated as follows:

"In assessing the weight to be given to intention as an element of murder, the relevant circumstances must be considered whether the appellant foresaw the risk of the voluntary act he was about to carry out against the deceased whether the appellant was able to foresee the real or substantial risk and the consequences of targeting the part of the body that may result in the deceased suffering grievous harm. A similar statement of Law was made in the persuasive authority of S. vs. Sigwahla [1967] 4 SA 566 in which the court stated

'The expression intention to kill does not in Law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused

subjectively foresaw the possibility of his act of causing death and was reckless of such result. This form of intention is known as a dolus eventualis as distinct from dolus directus.'"

32. In Republic vs. Tubere s/o Ochen [1945] 12 EACA 63, it was held that in determining whether malice aforethought has been proved the following elements should be considered:

> " The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab/wound or multiple injury; the conduct of the accused before, during, and after the incident."

33. From the post mortem report it is evident that the deceased died as a result of a severe head injury. Going by the evidence of Lusiana, the injury was caused by the appellant who used an axe to cut the deceased on the head. The head is such a critical part of the human anatomy. In attacking the deceased on the head using an axe in such a vicious manner, it was apparent that a cut on the head was likely to cause serious injuries that would result in either death or grievous harm to the deceased. The cumulative effect of the actions of the appellant is that the appellant intended to kill or maim the deceased. Malice aforethought was therefore established. Consequently, we are satisfied that all the ingredients of the offence of murder were proved to the required standard.

34. The appellant complained that the sentence imposed upon him was harsh and excessive. Under Section 379(1)(b) of the Criminal Procedure Code, a person tried by the High Court and sentenced to death or to imprisonment for a term exceeding twelve months, may appeal "with leave of the Court of Appeal, against sentence, unless the sentence is one fixed by law." Although the sentence for murder is fixed under Section 204 of the *Penal Code* as death, the Supreme Court in Muruatetu & another -vs- Republic; Katiba Institute & 5 others (Amicus Curiae) [2017] KESC 2 KLR, held that, the mandatory nature of the death sentence under Section 204 of the *Penal Code* is unconstitutional as it deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. This paved the way for courts to exercise their discretion in sentencing, by imposing sentences other than the death sentence, in appropriate cases.

35. In sentencing the appellant, the Court stated:

> " I note that the offence committed was serious, a person lost their life in serious circumstances that were not justified. The psychosocial report is not favourable to the accused. The sentence that the circumstances fall for should be deterrent for offences that are committed in such a senseless manner as the instant one. One, to teach a less to both the accused and the community that crime does not pay. I shall accordingly sentence the accused to serve forty years in prison."

36. It is clear that the court exercised its discretion in sentencing the appellant to a sentence of forty years imprisonment. Given the circumstances, the appellant having without provocation attacked and killed his own mother, the sentence of forty years imprisonment was neither excessive nor harsh. There is therefore no justification for this Court to interfere with the sentence.

37. The upshot of the above is that we uphold the judgment of the High Court and affirm the appellant's conviction and sentence. The appeal is therefore dismissed.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF MARCH, 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