Mauti v Republic (Criminal Appeal 310 of 2019)
[2025] KECA 641 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KECA 641 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 310 OF 2019

HA OMONDI, LK KIMARU & WK KORIR, JJA

APRIL 4, 2025

BETWEEN

JOSEPHAT MAUTI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisii (D.S. Majanja, J.) dated 25th July, 2019 in HCCRA No. 11 of 2019)

JUDGMENT

1. Joseph Mauti, the appellant herein, was tried by Majanja, J on an information which charged him with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the charge were that on the 11th day of April, 2019 at Nyakegogi Sub location in Sameta Sub County within Kisii County, the appellant murdered Dominic Oyunge Ontumi, “the deceased”.

2. The appellant pleaded not guilty to the charge, and the prosecution called 10 witnesses to prove its case, while the appellant gave unsworn evidence in his defence and did not call any witness. At the conclusion of the trial, he was found guilty of the offence, convicted, and sentenced to 20 years imprisonment.

3. Dissatisfied, the appellant preferred the present appeal faulting the learned judge for failing to find that the prosecution did not prove their case beyond a reasonable doubt, failing to find that the charge of murder was not proved and meting out a disproportionate, harsh and excessive.

4. Briefly, the facts of the appeal were that on 11th April, 2019 at about 10.00 a.m., Eric Mosiria Ochieng (Erick) who testified as PW2, (Emily Sarange Ongeri (Emily) who testified as PW3, Lilian Mokeira (Lilian), PW4 and Vincent Mogire Nyabuto (Vincent), PW5, were all inside the Maximum Bar (“the Bar”) at Itumbe market, when the appellant whom they all knew as a police officer at Itumbe, entered the bar dressed in police uniform and armed with a gun. The appellant went close to the place where Erick was seated while saying in Ekegusii: “I will kill someone … I will kill someone….”. Shortly

thereafter, Erick heard a gunshot and fell down. Thereafter, the appellant walked out of the bar but kept saying that he would kill someone.

5. On her part, Emily testified that upon the appellant entering the bar armed with a gun, he went to the first counter where Lilian was, and demanded to be served with a beer. Emily also heard the appellant saying that he would kill someone. Thereafter he went to the second counter where she heard him saying in Ekegusii, "I will kill someone with a gun ....". Emily saw the appellant pointing his gun at the deceased, who was seated next to her while talking in Ekegusii, that he would kill someone. She heard a gunshot and ran outside. On coming back, she found many people gathered around the deceased who had collapsed in a pool of blood.

6. The appellant went to the first counter, where Lillian was, and the latter told him to pay, but the appellant told her he would not pay. He put the gun on the counter and told her that he would shoot her. When he left her to go to the other bar, she heard a gunshot and ran out. On returning, she found the deceased had collapsed in a pool of blood.

7. While seated at the counter, Vincent could see what was happening. He stated that the deceased was seated about five (5) metres away from him when he saw the appellant shoot him. The appellant ran away thereafter.

8. PW7, Chief Inspector, George Wang'ombe was at home when he was called by a member of the public and informed that a shooting had taken place. He proceeded to the police station, where he found the appellant handing over his rifle to the officer in charge of the armory, (PW 6) Corporal Ezekiel Kiomi.

9. Corporal Kiomi stated that the appellant informed him that he had killed one person. He took the rifle, disabled the magazine and counted 29 bullets. He maintained that he had issued the appellant with 30 rounds of ammunition when he reported on duty earlier that evening.

10. Dr Brian Ayara (PW1) conducted the autopsy on the deceased's body on 12th April 2019 at the Kisii Teaching and Referral Hospital ("KTRH") Mortuary. He noted that the deceased's body was pale as a result of loss of blood. He observed that on the right side of the abdomen there was an entry wound measuring 10 X 10 mm above the iliac spine and on the left side there was an exit wound which was ragged and which was about 70mm long. Internal examination revealed that there were corresponding injuries in the abdomen, internal bleeding and a fracture of the iliac bones on the left hip. The deceased also had a fracture of the bone on the left hand. PW 1 concluded that the deceased died as a result of excessive bleeding due to a single penetrating gunshot wound injury.

11. During investigations, Chief Inspector Paul Langa, PW8, called for the Arms Movement Register. The register showed that the appellant was issued with and signed for an AK 47 Rifle Serial No. 60033624 with 30 rounds of ammunition of 7.62mm caliber on 11th April 2019. He also forwarded the rifle, the spent cartridge allegedly fired and the 29 rounds of ammunition by an Exhibit Memo dated 16th April 2019 to the Ballistics Department. Inspector Kenneth Chomba, PW9, a ballistic expert with the Directorate of Criminal Investigations, examined the AK 47 Rifle Serial No. 6003624 and upon conducting a microscopic examination of the fired cartridge and comparing it to the test ammunition fired, he confirmed that they were all fired from the AK 47 Rifle Serial No. 6003624 issued to the appellant. Photographs of the scene, with the deceased lying in a pool of blood, were taken by Cpl Charles Kitur, PW 10.

12. Placed on his defence, the appellant elected to make an unsworn statement and told the court that on the material day, he reported to the Police Station at 6.00 pm. While working, he ordered supper at the Bar. While still in uniform, he left work carrying his rifle and at about 10.00 pm he went to eat at the Bar. He testified that while he was at the Bar, he stood up and heard the blast of one round of

ammunition. He immediately ran outside the Bar and while outside, people started chasing him so he ran to the Police Station for safety. He met PC Omar at the report office and explained to him that he had discharged one bullet. The appellant could not tell how the bullet was discharged. He handed over the gun and magazine in the presence of PC Omar whereupon he was arrested. He further testified that since being enlisted with the General Service Unit of the Police Service in 2002, he had served without any blemish on his record and did not have any quarrel with anyone or any problem with members of the public at Itumbe.

13. The trial court found that the prosecution had proved its case of murder against the appellant beyond reasonable doubt, rejected the appellant's defence and convicted him. In sentencing the appellant, the trial court considered the appellant's mitigation that he was a police officer of 16 years standing with a young family that was dependent on him and that he had served the police service without blemish and was remorseful. The trial court found that the appellant was a police officer with a heavy responsibility on the use of his firearm. His actions were deliberate and the fact that a life was lost could not be ignored. Accordingly, the trial court sentenced the appellant to 20 years imprisonment.

14. In support of the appeal, the appellant submitted that malice aforethought under section 206 of the *Penal Code* was not established as there was no direct evidence on what transpired during the incident and at the scene of crime. Relying on the case of Mohammed and 3 Others vs. Republic [2005] 1KLR and in Mwangi and Another vs. Republic [2004] 2KLR, the appellant maintains that the evidence adduced by the prosecution eliminates the hypothesis that the appellant is guilty and that the prosecution did not provide any hypothesis of the acts and omissions of the appellant that lead to the death of the deceased.

15. It is further submitted that the appellant did not kill the deceased nor did he have any intention of killing the deceased; and that the cocked gun accidentally discharged itself; and there was no evidence to support the murder charge.

16. Regarding proof of murder, it is submitted that the prosecution failed to establish the ingredients of the offence; that in his evidence, the appellant told the court that upon the bullet discharging itself, he went and reported the same to PC Omar, explaining what had transpired; and that the evidence was corroborated by the evidence of PW4. It is pointed out that even PW2 stated in her evidence that after a short while she heard a gunshot and fell down as she was next to him. The appellant states that PW5 contradicted himself when in his evidence in chief, he stated that he saw the appellant shoot the deceased and upon being cross-examined he stated that he only saw the appellant at the keg counter and could not see the keg counter from his side.

17. It is argued that clearly nobody saw the appellant pull the trigger, as the bullet discharged accidentally; and it was unfortunate that the appellant uttered the words ''I will shoot someone" as stated by the witness making it difficult to believe that the bullet discharged itself; yet the unintentional discharge of the ammunition negated a deliberate action on the appellant's part.

18. On sentence, the appellant submits that the sentence of 20 years imprisonment is bad in law, disproportionate and harsh. Relying on the case of Peter Kipngeno Cheruiyot vs. Republic [2017] eKLR, the appellant urged the Court to consider the past decisions in which it interfered with the sentence, reduce the sentence considering the fact that the appellant was a first offender and the period he has spent in custody.

19. The appellant submits that in meting out the sentence, the trial court did not consider the mitigating circumstances contrary to the guidelines in Francis Karioko Muruatetu and Another vs. Republic [2017] eKLR. That based on the guidelines in Muruatetu, the appellant urges the Court to consider resentencing the appellant.

20. Opposing the appeal, the respondent contended that contrary to the appellant's assertion that the case was determined based on circumstantial evidence, the case was determined based on direct evidence as stated by PW5 who saw the appellant shoot the deceased and PW2 and PW4 who placed the appellant at the scene, saw him with a gun and heard him threaten to "kill someone" as such there was malice aforethought in the appellant's unrebutted utterances. Further, that the appellant being a trained officer possessed the knowledge that shooting someone with a firearm at close range would occasion grievous harm and or death.

21. It is further submitted that all the ingredients of the offence were proved beyond reasonable doubt. The death and cause of death of the deceased were never disputed before the trial court, nor are they disputed before this Court. Malice aforethought was established through the appellant's determination to kill someone. Further, contrary to the allegations that no one saw him pull the trigger, PW5 saw the appellant shoot the deceased, as such it is not true that the bullet was discharged accidentally.

22. Regarding the sentence of 20 years imprisonment, the respondent submits that sentencing is an exercise of judicial discretion which cannot be interfered with by an appellate court without proof that the same was wrongly exercised; pointing out that the maximum sentence upon conviction for murder is death penalty. The appellant herein was sentenced to serve 20 years imprisonment, which is not excessive. Further, that in sentencing, the court considered the appellant's mitigation, a pre-sentence report, and views of the victim's family was considered. It is argued that there is no evidence the sentencing discretion was whimsically exercised by the trial court.

23. This being a first appeal, the Court is required to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis and reach its own conclusion, always bearing in mind that it neither saw nor heard any of the witnesses and has to give due allowance. In the oft-cited case of Okeno vs. Republic (1972) EA 32 the predecessor of this court stated that:

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R (1957) EA 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 finding and conclusion; 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) EA 424)".

24. Having carefully considered the record of appeal, submissions by respective counsel, the authorities cited and the law, the main issues that arise for determination are whether the offence of murder was proved beyond a reasonable doubt to sustain a conviction, and if so, whether the appellant's sentence should be reduced.

25. The appellant was charged and convicted of the offence of murder. Section 203 of the *Penal Code* provides as follows:

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

26. To sustain a conviction on the charge of murder, the prosecution must prove that the death of the deceased occurred; that the death was caused by the appellant and that the appellant had the required malice aforethought. These three essential ingredients must be proved beyond any reasonable doubt.

The essential ingredients of murder were outlined in the case of Anthony Ndegwa Ngari vs. Republic [2014] eKLR as follows:

> "…that the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased; and that the accused had malice aforethought."

27. Starting with whether the case by the prosecution was proved to the required standard, there was the direct testimony of [PW5] Vincent on the events as they unfolded on the fateful day. He knew the appellant as a police officer at Itumbe. He testified that while at the counter, the appellant, who was in uniform and had a firearm, came in threatening in Ekegusii language that he was going to kill someone. PW5 testified that he saw the appellant shoot the deceased. This was corroborated by the post-mortem report conducted by Dr. Ayara who opined that the deceased died as a result of excessive bleeding due to a single penetrating gunshot wound injury.

28. On identification, the appellant was placed at the scene of the crime by PW2, PW3, PW4, PW5 and confirmed by the appellant himself The evidence of PW3 and PW4 was that when the appellant came into the bar, he threatened that he was going to kill someone. Shortly after, PW5 saw the appellant shoot the deceased who was seated about five (5) meters away.

29. The trial Judge considered the direct evidence of a witness who saw the appellant shoot the deceased, namely PW5 who was very categorical that he saw the appellant shoot the deceased. The witness described the events as they had unfolded, and the Judge believed that he told the truth, which conclusion is also reached by this Court.

30. As to whether malice aforethought was established, this Court has in the case Republic vs. Tubere s/o Ochen [1945] 12 EACA 63 acknowledged that in determining whether malice aforethought has been established 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."

31. As to whether the prosecution proved that the appellant had malice aforethought when he shot the deceased, Section 206 of the same *Penal Code* defines what malice aforethought is. It provides as follows:

> "Malice aforethought shall be deemed to be established by evidence proving any one or more 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. Malice aforethought was succinctly discussed by this Court in Nzuki vs. R [1993] KLR 171 in the following terms:

> Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:
>
> i. The intention to cause death;
>
> ii. The intention to cause grievous bodily harm;
>
> iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits these acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

33. It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who was killed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is by itself enough to establish malice aforethought.

34. In the instant appeal, a pertinent question is whether there was sufficient evidence on record to establish that the appellant intended to cause the death of the deceased or cause him grievous harm. In the case of Bonaya Tutut Ipu & Another vs. R, [2015] eKLR this Court cited with approval the persuasive authority of the Ugandan Court of Appeal case of Chesakit vs. UG, Criminal Appeal 95 of 2004 where that Court held:

> " In determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person."

35. The court also drew inspiration from a decision of the predecessor of this Court in Rex vs. Tuper S/O Ocher [1945] 12 EACA 63 wherein, it was ruled:

> " It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily, an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick…"

36. The appellant went to the bar with a single mission in his mind.

At the bar, he stated that he was going to kill someone. The appellant had a firearm that he had cocked. According to the evidence of PW5, the appellant shot the deceased at close range. The chain of events or actions by the appellant clearly demonstrate that he intended to kill the deceased or inflict upon him grievous harm. In Bonaya Tutu Ipu & Another vs. Republic [supra] eKLR, this Court stated that:

> " Malice aforethought" is the mens rea for the offence of murder and it is the presence or absence of malice aforethought, which is decisive in determining whether an unlawful

killing amount to murder or manslaughter. Whether or not malice aforethought is proved depends on the peculiar facts of each case".

37. In this appeal, considering the nature of the weapon used, a firearm; the distance between the appellant and the deceased at the time of the shooting; the fact that the deceased was unarmed and had not attacked and/or provoked the appellant; and the part of the deceased's body that was shot, the learned judge was right in holding that the appellant had malice aforethought and therefore the charge of murder had been well proved.

38. From the post-mortem report it was evident that the deceased died as a result of a gunshot wound in the stomach. The stomach is such a critical part of the human anatomy. It goes beyond any peradventure that once the stomach is subjected to serious injuries, then death was imminent. The manner of execution of the mission was very deliberate and targeted. By considering the cumulative actions of the appellant in the manner he executed the killing, it is without any shred of doubt that the appellant intended to kill the deceased. The prosecution, therefore, proved malice aforethought, and therefore all the ingredients of murder were established in this case. The appellant's conviction was based on sound evidence. The appellant's appeal against conviction therefore lacks merit and is hereby dismissed.

39. In his oral submissions, Mr. Menezes learned counsel for the appellant maintains that at the time of the commission of the offence, the appellant had mental issues and complained that before taking plea, the appellant was never subjected to a mental examination to establish that he was fit to stand trial. However, in F-U-M*V. Republic, Criminal Appeal No. 139 of 2010* the Court explained that:

> " On whether or not the appellant should first have been taken for a psychiatric examination, we are unable to find a legal basis for that requirement. It little matters that some practice exists whereby murder suspects are first taken for such assessment. The law is quite clear that all persons are presumed to be compos mentis: Section 11 of the *Penal Code* states as much. If it is an accused person's defence that he was not of good mind at the time of the commission of the offence, the onus is on him to raise and prove it on a balance of probability. See section 107, 109 and 111 of the *Evidence Act*"

40. Further, from the record, the appellant did not raise a defence of insanity. There was no doubt raised as to his mental capacity. As the Court said in FUM V. Republic [supra], mental examination of suspects accused of murder has been done as a matter of practice rather than law. No prejudice was occasioned to the appellant by the failure to subject him to a psychiatric evaluation. In any event, at no time during the entire trial did m the appellant state that he was of such a state of mind that he could not stand trial or follow the proceedings. Therefore, nothing turns on this issue.

41. Contrary to the allegation by the appellant that the bullet accidentally discharged and hit the deceased, all the witnesses testified to the fact that the appellant in his utterances vowed to kill someone. Clearly, these kind of utterances by the appellant show that the killing of the deceased by the appellant was not spontaneous. It was deliberate.

42. As regards sentence, this being a first appeal, the Court is required to consider whether the trial court properly exercised its discretion in sentencing the appellant. From the record, the appellant was sentenced to serve 20 years imprisonment. Counsel for the appellant asserted that the sentence meted out on the appellant was, in the circumstances harsh and excessive. On the other hand, counsel for the respondent submitted that the maximum punishment prescribed in the *Penal Code* is death. The appellant was sentenced to serve 20 years imprisonment which sentence is lenient.

43. Taking into consideration the sentence meted out on the appellant against the facts of the case, the facts show that the deceased, an innocent unarmed worker, was shot at close range and suffered multiple organ injuries leading to his death. This was a needless, cruel and heartless crime by an officer of many years standing. From the nature of the injuries sustained by the deceased, it is clear that the appellant did inflict them with malice aforethought and that his conviction for murder was merited. The sentence meted out on him was fair and proportionate to the crime that he committed and there is no reason to interfere with the sentence. Ultimately, our finding is that the appeal lacks merit and is dismissed.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF APRIL, 2025.

H. A. OMONDI

....

JUDGE OF APPEAL

L. KIMARU

....

JUDGE OF APPEAL

W. KORIR

....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR