Magoiga v Republic (Criminal Appeal 166 of 2017)
[2025] KECA 1029 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KECA 1029 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 166 OF 2017

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

MAY 30, 2025

BETWEEN

HUSSEIN MARENGO MAGOIGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the judgment of the High Court of Kenya at Migori, (Mrima, J) dated 27th July 2017 in HCCRC No 1 of 2015)

JUDGMENT

1. The judgment concerning the appellant, Hussein Marengo Magoiga, in the High Court of Kenya at Migori, related to the tragic events of 20th January 2015 in Nyamtiro village, Kuria East Sub- County, Migori County. They related to the deaths of his daughter, Rabia Rioba Marengo, ("the 1st deceased") and mother Cecilia Boke Magoiga ("the 2nd deceased"). As a result, the appellant faced two counts of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. In Count I, the appellant was charged with the murder of the 1st deceased, with the particulars stating that he unlawfully caused her death by inflicting fatal injuries using a sharp panga. In Count II, the appellant was charged with the murder of the 2nd deceased, with the particulars indicating that he unlawfully caused her death on the same date and locality by attacking her with a sharp panga, resulting in severe and fatal injuries.

2. On the day in question, the appellant's daughter, the first deceased, sustained injuries when the temporary gate of their homestead which had been mounted to prevent her from getting out fell on her. Not amused by the incident, the appellant who had converted to Islam religion recently and was reading the Koran nearby rose from where he was, retrieved a sharp panga from his bedroom and proceeded to the kitchen, where the 1st and 2nd deceased were. Moments later, loud screams were heard emanating therefrom. Upon investigation, it was discovered that both deceased had suffered severe injuries. The 1st deceased, a young child, had succumbed to her injuries at the scene, while the 2nd

deceased, despite being grievously injured, succumbed to her injuries while being rushed to the hospital for treatment and management.

3. All these happenings were witnessed by PW1, Juli Wantigo Magoiga, who also happens to be the appellant's sister. She was at the home on the day of the incident with the two deceased and the appellant, going about her chores. Upon hearing the screams emanating from the kitchen soon after the appellant had entered and left, she went in to check only to find the two deceased with severe injuries, prompting her to raise an alarm alerting neighbours and authorities of the incident. She told those who cared to listen that the appellant was responsible for the deaths.

4. PW2, Daniel Magoiga Marengo, father to the appellant, paternal grandfather to the 1st deceased and husband to the 2nd deceased, had left the homestead to visit a nearby shopping centre. Upon hearing screams emanating from his homestead, he rushed back home. On arrival, he found the two deceased severely injured, with the 1st deceased already dead. He transported the 2nd deceased to the hospital, where she was pronounced dead on arrival. PW2 also helped to secure and preserve the scene.

5. PW3, Dominic Chacha, a brother of the appellant was not at home during the incident but returned immediately upon hearing screams from the direction of his home. He was met with horrifying scene of two deceased bodies. He went in to the house he shared with the appellant and retrieved a sharp, bloodstained panga from the appellant's bedroom which he handed to the police. PW3 later participated in identifying the bodies of the deceased for purposes of post-mortem examination.

6. PW4, Dr. K'Ogutu Vitalis, conducted a mental assessment of the appellant and deemed him fit to stand trial. He also tendered in evidence the post-mortem reports prepared by Dr. Ndege, which outlined the injuries sustained by the deceased and concluded that the fatal injuries had been inflicted using a sharp object.

7. PW5, Emily Kwamboka Okworo, a government analyst, presented a forensic analysis report confirming that the bloodstains on the recovered panga matched the DNA profile of the 1st deceased. However, no DNA profile was obtained for the 2nd deceased due to poor sample storage.

8. PW6, PC Joshua Adenya, the investigating officer, supervised the collection of evidence, managed the post-mortem processes, and was involved in the appellant's arrest. He testified about the recovery of the bloodstained panga and detailed the procedural aspects of the investigations.

9. After the close of the prosecution's case, the trial court placed the appellant on his defence. The appellant opted to give unsworn statement in which he raised an alibi defence claiming that he was nowhere near the scene of crime. He stated that he had accompanied other Muslim leaders to Tanzania for prayers and was away when the crimes were committed. He was however called by a Muslim brethren who informed him of the incident. Upon returning home, he found a crowd gathered and learned from his wife, Florence, that their daughter and his mother were dead.

10. Upon evaluation of the evidence, submissions by respective counsel and the law, the trial court determined that the evidence presented by the prosecution placed the appellant at the scene of crime and linked him to the unlawful acts resulting in the two deaths. The trial court dismissed the alibi defence and ultimately found the appellant guilty of the two counts of murder. Consequent upon which, the appellant was sentenced to death on both counts. However, since one cannot die twice over, the sentence in respect of the second count was placed in abeyance pending the execution of the sentence in the first count.

11. The Appellant, being dissatisfied with the conviction and sentence, has proffered this appeal citing various grievances. These includes the trial court's reliance on circumstantial evidence tendered by a

single minor witness, which was contradictory and uncorroborated; use of DNA sampling ordered under Sections 122A and 122D of the *Evidence Act*; failure to give proper weight to his alibi defence and that the sentence imposed was unconstitutional and excessively harsh given the circumstances of the case.

12. The appeal was heard on 10th March, 2025 through written submissions with limited oral submissions. Ms. Betty Asuna, learned counsel appeared for the appellant while Ms. Ikol Esaba, learned Prosecution Counsel appeared for the respondent.

13. Counsel for the appellant collapsed the grounds of appeal into whether the conviction was grounded in law; and whether the sentence imposed was unconstitutional, manifestly harsh and excessive.

14. On the first issue, Counsel argued that the conviction of the appellant was based on circumstantial evidence of a single minor witness whose testimony was contradictory, uncorroborated, and unsupported by any material evidence. She highlighted inconsistencies in the testimonies of PW1, PW2, and PW3 regarding his presence at the scene of crime and the recovery of the murder weapon. To counsel, these contradictions were not minor so as to be ignored; rather they were major and consequently undermined the prosecution's case. Counsel also criticized the trial court for failing to caution itself on the dangers of convicting the appellant solely on such evidence and for not adequately considering his alibi defence, which was corroborated by the inconsistencies in the prosecution's case.

15. Further, counsel submitted that the DNA sampling was procedurally flawed because it was ordered by a police officer below the rank of inspector of police as stipulated in the *Evidence Act*. This, she contended, rendered the process irregular and prejudicial to the appellant, as it did not comply with the legal requirements governing evidence collection in criminal investigations. She further asserted that this procedural impropriety violated the appellant's constitutional rights under Article 50(4) of the Kenyan Constitution, which safeguards individuals against evidence obtained unfairly or in contravention of the law.

16. Counsel challenged the identification evidence presented during the trial, arguing that it was flawed and unreliable. She submitted that the prosecution's case heavily turned on the testimony of PW1, who was the sole witness who identified the appellant as the assailant. She contended that PW1 did not directly witness the murders and that her evidence was not corroborated by any other evidence. Counsel further argued that the circumstances under which PW1 claimed to have identified the appellant were not conducive for reliable identification and left room for error.

17. Counsel further submitted that the appellant, in his defence, raised an alibi, claiming that he was not present at the scene during the incident. He stated that he had accompanied other Muslim leaders to Tanzania for prayers and was away when the crimes were committed. That this defence was not disapproved by the prosecution and ought therefore, to have led to his acquittal.

18. On the second issue, counsel contended that the death sentence imposed upon the appellant was manifestly harsh and excessive, given the constitutional provisions in Article 29 of *the Constitution* of Kenya and the African Charter on Human and People's Rights which prohibit cruel, inhumane, and degrading treatment. She urged the Court to consider the precedent set by the Supreme Court in the case of Francis Karioko Muruatetu & Anor v. Republic (2017) eKLR, which outlawed the mandatory nature of death sentence in murder cases and William Okungu Kittiny v. Republic (2015) eKLR, which allowed courts discretion to impose alternative sentences apart from death. She also relied on cases such as Kanuu v. Republic (Criminal Appeal E065 of 2021 (2024) KEHC 6586 (KLR)) and Chivoli v. Republic (Criminal Appeal E037 of 2023 (2024) KEHC 858 (KLR)), in which death sentences previously imposed were successfully reduced to term sentences by the appellate courts, to

support his plea for the substitution of the death sentence imposed on the appellant with a lesser custodial or non- custodial term.

19. Counsel in the ultimate urged this Court to allow the appeal, quash the conviction, and substitute the sentence imposed with an appropriate term sentence after taking into account the time the appellant had already served in remand custody.

20. The appeal was opposed by the respondent in its entirety. Counsel submitted that this was a first appeal and cited the case of Kamau v. Munai (2006) IKLR 150, to emphasize the role of the first appellate court which is to re-evaluate and assess the evidence afresh and reach its own independent conclusions while making allowance for not having seen or heard the witnesses as they testified. She also referred to Njoroge v. Republic (1987) eKLR 19, in support of the same proposition.

21. On circumstantial evidence, counsel argued that the identity of the appellant as the perpetrator was not in doubt, since PW1, the appellant's sister, had sufficient time to recognize him, as the offence occurred at 6.00 p.m. when there was still adequate light. Although PW1 did not witness the murders, she saw the appellant retrieve a panga, enter the kitchen where the deceased were, heard their mother yelling that the appellant was killing her and thereafter saw the appellant exit from the Kitchen. When the witness soon thereafter entered the kitchen, she came across the deceased who had been fatally injured. Counsel relied on the case of R v. Kipkering Arap Koske (1953), to emphasize the point that circumstantial evidence can find a conviction as long as its consistent with the guilt of the accused and exclude any other reasonable explanation or hypothesis. Given her testimony as to how the events unfolded, there could not have been any other person who could have committed the offences other than the appellant. She noted that the trial court found PW1 and PW2 to be honest and truthful witnesses, which holding cannot be faulted by this Court.

22. Regarding the DNA sampling, counsel argued that it was conducted as part of the investigations and was necessary given the seriousness of the charges. She submitted that the process was neither unfair nor prejudicial to the appellant, as it balanced the interests of both the appellant and the deceased persons.

23. On the appellant's alibi defence, counsel contended that it was raised late, lacked prior notice to the prosecution, and was unsupported by any witnesses. It was submitted that the prosecution placed the appellant at the scene immediately before and after the murders, rendering the alibi vague and an afterthought.

24. On sentence, counsel submitted that the death sentence was appropriate given the gravity of the offences, which involved the murder of two individuals, including a defenceless infant. She argued that the appellant's reliance on the Muruatetu case was misplaced, as the Supreme Court's decision did not invalidate the death sentence per se under Article 26(3) of *the Constitution*.

25. In conclusion, counsel urged the Court to uphold the conviction and sentence, asserting that the appeal was without merit. However, should the Court be inclined to interfere with the sentence, she proposed a term of at least 60 years' imprisonment to ensure justice was best served.

26. As correctly observed by counsel for the respondent, this being a first appeal, the duty of this Court is to re-evaluate and re-analyze the evidence presented in the trial court and draw its own independent conclusions while giving due allowance for the fact that it did not see or hear the witnesses testify. In the now well-known case of Okeno V. R [1972] E.A. 32, this Court's predecessor stated:

> " 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."

27. Having stated as much, considered the record, written and oral submissions presented before us and the authorities cited, the issues we discern for our consideration are whether: the appellant's conviction was properly grounded in law; the DNA sampling and its results were inadmissible; the appellant's alibi defence was properly considered and whether the sentence imposed was harsh, excessive and or unconstitutional.

28. On the first issue, we note that the court's decision was mainlybased on the testimony of PW1, who was the sole eyewitness to the events leading to the deaths of the two deceased. She testified that she saw the appellant retrieve a sharp panga, express dissatisfaction with the care being given to his daughter, the 1st deceased, proceeded to the kitchen where the two deceased were. Shortly thereafter, she heard screams with the 2nd deceased lamenting loudly why the appellant was killing them. When the appellant left and the witness entered the kitchen, she found the two deceased with severe injuries.

29. This testimony was corroborated by other evidence, including the recovery of the bloodstained panga by PW3 from the appellant's bedroom. Furthermore, there was forensic analysis by PW5, which linked the recovered blood-stained panga to the blood sample of the 1st deceased. There could not have been any other person who could committed those acts other than the appellant therefor.

30. The trial court carefully evaluated the evidence and found PW1 to be a credible and truthful witness. We have no reason to depart from this finding on the credibility or demeanour of the witnesses. As stated in the cases of Republic vs Phlumayo & Another [1948] (2) SA 677 (A) and S vs Mlumbi 1992(1) SACR 235 (SCA), an appellate court will not interfere or temper with the trial court's findings on the demeanor of witnesses unless there are demonstrable and material misdirection by the trial court from where the recorded evidence shows that the finding is clearly wrong. We discern no such misgivings with trial court's determination. Certainly, therefore PW1's testimony was honest and believable entitling the trial court to act on it, though from a single witness.

31. This Court in Wamunga v. Republic [1989] KLR 424 emphasized that evidence of identification by a single witness must be carefully scrutinized to ensure that it is free from error. Similarly, in Nzaro v. Republic (1991) KAR 212, the court held that such evidence must be absolutely watertight to justify a conviction. In this case, the circumstances of identification of the appellant were favourable, as the incident occurred during daylight, and PW1 had ample opportunity to observe the appellant. Indeed, this was not even a case of identification of a stranger in difficult circumstances but one of recognition by a close relative.

32. In Anjononi vs Republic [1980] eKLR, it was stated by this Court that evidence of recognition of an assailant is more satisfactory, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another. Much as the evidence of the identification and or recognition of the appellant was by a single witness, it was worth of belief and the trial court did not therefore err in believing and acting on it. It is also not lost on us that the trial court

appreciating the need to caution itself of the dangers of relying on the evidence of a single witness on matters identification. It did exactly that. In our view therefore, the trial court cannot be faulted for relying on that evidence to find a conviction.

33. Reliance on circumstantial evidence to found a conviction is permissible, provided that such evidence meets the legal threshold. The Supreme Court in Republic v. Mohammed & Another [2019] KESC 48 reiterated that circumstantial evidence can form the basis for a conviction. However, this can only be if the trial court is satisfied such evidence forms a complete chain of events that points irresistibly to the guilt of the accused and excludes any other reasonable hypothesis. In our view however, this was strictly not a case of circumstantial evidence in the real sense of the word but rather one of direct evidence. Other than not witnessing the real killing, PW1 was a witness to the build up of events culminating to the deaths. She saw the appellant arm himself with a sharp panga, get into and out of the kitchen in which the deceased were, heard the 2nd deceased plead with the appellant not to kill them, and when she entered the kitchen soon after the appellant had left, she found the bodies of the deceased. There was no other person in the vicinity who could have committed the fatal acts complained of.

34. That notwithstanding, even if it was, applying the well settled principles of circumstantial evidence referred to elsewhere in this judgment, the trial court would still have found that the circumstantial evidence led by the evidence of PW1, and the forensic evidence, that showed that the blood on the blood stained panga matched the DNA profile of the blood of the 1st deceased, directly linked the appellant to the weapon used in the attack and the finding of the blood stained panga in the appellant's bedroom reinforced the prosecution's case. However, it is worth noting that the blood sample from the second deceased, did not generate a DNA profile due to poor sample storage. This fact notwithstanding, the death of the two deceased having occurred in the same transaction, and the appellant having been directly linked to the death of the 1st deceased, it can safely be concluded that he was equally culpable for the death of the 2nd deceased. We are satisfied just like the trial court, that these pieces of circumstantial evidence established the appellant's guilt beyond a reasonable doubt.

35. Turning to whether the DNA sampling and its results were admissible and complied with legal and constitutional standards; we have to consider whether the DNA analysis was lawfully conducted, particularly as it was ordered by a police officer of a lower rank, and whether this procedural misstep affected the fairness and reliability of such evidence.

36. On the first aspect, the DNA analysis was central to the prosecution's case. PW5, a government analyst, testified that the bloodstains on the panga matched the DNA blood profile of the 1st deceased, directly linking the murder weapon to the crime. However, the blood sample from the 2nd deceased did not generate her DNA blood profile, which PW5 attributed to poor sample storage. The DNA results corroborated PW1's testimony that the appellant retrieved the panga from the house before entering the kitchen where the deceased were found with fatal injuries having been cut. We agree with the trial court that this evidence, was credible and significant in establishing the appellant's connection to the crime.

37. Secondly, the appellant challenged the admissibility of the DNA evidence, arguing that it was ordered by a police officer below the rank of inspector of police stipulated under the *Evidence Act*. That it was therefore inadmissible and that its admission was unlawful, prejudicial and detrimental to his case. The appellant further argued that this irregularity violated his constitutional rights under Article 50(4) of the Kenyan Constitution, which excludes evidence obtained in a manner that renders the trial unfair or detrimental to the administration of justice.

38. First and foremost, the legal regime governing the DNA sampling is section 122A of the *Penal Code* and not the *Evidence Act* as submitted by counsel for the appellant. It allows a senior police officer of at least

the rank of inspector to order a DNA sample from a suspect if there are reasonable grounds to believe the sample might provide evidence related to a serious offence. To our mind, the requirement that the DNA sampling be authorized by a senior police officer is to ensure proper oversight and procedural fairness. However, from the record, this exercise was authorised by the investigating officer who was not of the above an Inspector of police.

39. However was this omission fatal to the prosecution case? The answer lies or can be addressed in light of the principles set out in the case of Republic v. Mohammed & Another [2019] KESC 48. In this case the Supreme Court emphasized that procedural irregularities in evidence collection should be evaluated for their impact on the fairness of the trial. If the irregularity does not prejudice the accused or affect the reliability of the evidence, the court may admit the evidence. Similarly, in Chembe v. Republic (2024) KECA 647, this Court held that the probative value of forensic evidence must be weighed against any procedural impropriety to determine its admissibility.

40. We are satisfied as did the trial court that while the procedural oversight regarding the rank of the officer who ordered the DNA sampling was a concern, it did not compromise the fairness or reliability of the evidence at all. The DNA analysis conducted by PW5 was deemed scientifically accurate and critical in corroborating other evidence of PW1 and PW3. The court balanced the appellant's rights against the need to administer justice in a case involving two counts of murder and concluded that it was proper to admit it. The decision aligns with legal principles and precedents, ensuring that justice was not only done but also seen to be done. We have no reason to disagree!

41. To the third issue regarding appellant's alibi defence. Was the defenceproperly evaluated by the trial court against the prosecution's evidence, and created any reasonable doubt as to his guilt? The appellant claimed that he was not at the scene during the incident, asserting that he had traveled to Tanzania with other Muslim leaders for prayers and only learned of the deaths through a Muslim brethren upon his return. On the other hand, the prosecution claimed that the alibi was raised too late in the proceedings which did not accord them opportunity to investigate it as required. It was further argued that the prosecution evidence placed the appellant at the scene of crime and therefore the alibi was displaced and was a mere afterthought.

42. From the record, it is apparent that the defence was only raised when the appellant was put on his defence. There was no indication by the appellant during the cross examination of the prosecution witnesses that such defence was in the offing. The respondent is therefore right in its complaint. However, in Kiarie v. Republic [1984] KLR 739 and Wangombe v. Republic [1980] KLR 149, this Court held that even if the alibi defence is raised late, the trial court must consider it and weigh it against the prosecution's evidence. This is exactly what the trial court did. Weighing the alibi against the prosecution's evidence, particularly the testimony of PW1, who saw the appellant in action, PW2 and PW3 who confirmed the appellant's presence in the homestead immediately before and after the incident, leaves us with no doubt at all just like the trial court that the appellant's alibi defence was but than an afterthought. This determination is further fortified by the courts' observation that PW1 and PW2 testified truthfully and that their demeanor was honest and consistent during cross-examination.

43. Was the sentence imposed harsh, excessive, or unconstitutional? We note that the trial court imposed the death penalty on the appellant due to the gravity of the offence, which involved the deliberate and brutal murder of two human beings, including a defenceless infant. The sentence was grounded on section 204 of the *Penal Code*, which prescribe as ultimate the sentence of death for the offence of murder. The heinous nature of the crime and its profound impact on the victims' family weighed heavily on the court's decision.

44. Yes, the Supreme Court in Francis Karioko Muruatetu & Another v. Republic (supra) (Muruatetu 1), declared the mandatory nature of the death penalty in murder cases unconstitutional but did not outrightly outlaw such sentence. It can still be imposed as the maximum sentence in suitable cases. It nonetheless affirmed the importance of judicial discretion in sentencing. It emphasized that courts must weigh the specific circumstances of both the offender and the offence to ensure a just outcome.

45. In this case, the trial court afforded the appellant an opportunity to present mitigation during sentencing. The appellant pleaded for leniency, citing personal circumstances and his background. However, the court found that the gravity and brutality of the offences outweighed the mitigating factors raised. The heinous manner in which the crime was committed called for no other sentence other than the death penalty which was an appropriate and proportionate in the circumstances.

46. We are satisfied that the trial court acted within the law and properly exercised its discretion in imposing the sentence. Its decision was consistent with constitutional principles, established jurisprudence, and the Sentencing Policy Guidelines (2016), which advocate for proportionality and fairness in sentencing. We find no reason to interfere with the trial court's decision on sentence.

47. Ultimately, the appeal is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MAY, 2025.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

H.A. OMONDI

JUDGE OF APPEAL

L. KIMARU

JUDGE OF APPEAL