Mputhia v Republic (Criminal Appeal 12 of 2018) [2025] KECA 945 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 945 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 12 OF 2018

S OLE KANTAI, A ALI-ARONI & JW LESSIT, JJA

MAY 9, 2025

BETWEEN

JOHN MWENDA MPUTHIA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the conviction and sentence of the High Court of Kenya at Meru (Wendoh, J.) dated 29th November 2017 in HCCR. No. 49 of 2009)

JUDGMENT

1. This is a first appeal against the appellant's conviction and sentence for the offence of murder. As such, it is the duty of this Court to reconsider and re-evaluate the evidence adduced before the trial court with a view to reaching its independent determination on whether or not to uphold the conviction and sentence of the trial court as stated in the case of Okeno vs. Republic [1972] EA 32. John Mwenda Mputhia, the appellant was charged before the High Court in Meru, with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that on 26th April 2009, in Mariene Village, Ngonyi Sub–Location, Mitunguu Location, Mitunguu Division, South Imenti District, within the Eastern Province, he murdered Stephen Mungeria.

2. Bearing in mind the foregoing, it would be appropriate to provide a brief background of the facts leading to this appeal. PW1 Roseta Gakii Mwongera, the deceased's wife, testified that on 26th April 2009, at around 11:00 pm, while she was asleep in the house, she was visited by one Mutwiri and his wife. They informed her that her late husband had been assaulted. She accompanied the couple to Maringene, where her husband operated a butchery. Upon arrival at the butchery, she found a large crowd surrounding her husband, who was lying on the ground. She tried to speak to him, but he did not respond. She noticed injuries on his chest, hand, and back.

3. PW1 further, testified that the village elder organized a vehicle to take her late husband to the hospital, when the vehicle came, she boarded the same with her injured husband and a man named Mureithi, along with the appellant, who had allegedly fought with her husband. They were taken to Nkubu Hospital, where PW1's husband was pronounced dead on arrival. His body was then transferred to the Meru District Hospital Mortuary. The following day PW1 recorded her statement, and on 29th April 2009, she went to the mortuary to identify her husband's body before the post-mortem examination was conducted.

4. PW3 Bernard Murerwa was the only witness who could identify the perpetrator. It was his testimony that he worked for the deceased, who ran a butchery, and that on 26th April 2009, the appellant had gone calling when he served him with meat worth Kshs. 50. The appellant ate the meat, but when asked to pay for the same by the witness, he refused and struck the witness with an axe that was kept in the room. The deceased, who was outside, came into the room and enquired why the appellant had attacked the witness, when the appellant chased the deceased, pursuing him to the toilets about 30 meters away. PW3 managed to get back up and saw the appellant attacking the deceased with the same axe, striking him on the back.

5. He testified further that he heard the deceased crying and saying that the appellant had killed him. Further that when the neighbors arrived, the appellant mentioned that he was also injured. The villagers pooled their money together and hired a vehicle to take the deceased, who was seriously injured, to the hospital. The appellant, PW1, and the deceased all got into the vehicle.

6. PW3 further informed the court that he knew the appellant and his parents, as they grew up together. He did not have any disputes with the appellant, except for the incident on that day when the appellant refused to pay him and assaulted him with an axe. It was also his testimony that due to the injuries inflicted on his mouth by the appellant, he lost two of his front teeth.

7. PW4 Cpl. Kenneth Otieno testified that on 27th April 2009, at approximately 12:30 am, he received a call from Sergeant Kavali, the duty officer, who informed him that someone had been seriously injured and brought to the police station. On reaching the police station, he found the appellant and the injured person in a vehicle. The injured person was unresponsive and unable to speak. He had injuries on the neck and was bleeding, and his clothes were soaked in blood. While both individuals were booked at the station, the appellant was not arrested then. They took both to a nearby hospital, where the doctor confirmed that the injured person had died. Following this, the vehicle returned to the station, and PC(W) Ngaiwa subsequently arrested the appellant. The deceased’s body was placed in a police vehicle and transported to the Meru Hospital Mortuary.

8. PW4 then recorded statements from the witnesses who were present and learned that the appellant had injured the deceased. He also attended the post-mortem with the deceased's family, after which the appellant was charged.

9. When placed on his defence, the appellant gave a sworn statement. He testified that on 26th April 2009, he was in Nkubu. It was a Sunday, and he was relaxing while eating miraa. He remained there until midnight. He was later apprehended, taken to the cells, and charged with the offence of murder. He did not know Stephen Mungeria (the deceased), nor was he aware of the circumstances surrounding his death or the witnesses involved. He denied having any altercation with the deceased. Additionally, he stated that he did not report any incident to the police on 27th April 2009, nor did he file an assault complaint, as he had not been harmed and had no injuries. He could not tell why he was linked to Stephen's death. He denied having made a statement to the police.

10. In his judgment, the trial judge found that the post-mortem report showed that the deceased had suffered several injuries. Further, PW1, PW2, and PW4 attended the postmortem, and therefore, the deceased's death was not in doubt. Relying on a single identifying witness and warning herself of the dangers of doing so, the court was satisfied that PW3 was able to see the appellant well, he was a person he knew well, and given the lighting at the butchery, he was able to identify the appellant as the person who had stabbed the deceased. Further, the court observed that the appellant did not leave the scene of the crime even after injuring the deceased. As for the defence mounted by the appellant, the court found that it was a mere denial and untrue.

11. Ultimately, the trial judge found that the ingredients of the offence of murder had been established and that the charge had been proven beyond all reasonable doubt. It convicted the appellant as charged and sentenced him to death.

12. Aggrieved by the judgement, the appellant lodged the instant appeal by filing a memorandum of appeal lodged on 14th December 2017 on grounds: that the judge erred in law as she failed to consider that: the scene of crime was not visited by the police for proper investigation; the appellant reported the matter before the incident vide OB No. 5 of 27/4/2009; the burden of proof had been shifted to the appellant; the judge did not warn herself on the danger of relying on a single witness's evidence; the appellant was attacked by more than two people and had to defend himself; the appellant was also injured on his forehead and got treated in the same hospital the deceased was taken; the prosecution did not prove the case beyond reasonable doubts; the cause of death of the deceased was as a result of affray as he also injured the appellant during the scuffle; and the trial court passed a harsh sentence on the appellant without warning herself of danger that surrounds the decision she made.

13. Learned counsel for the appellant filed submissions dated 25th October 2024, summarizing the issues for determination as whether the prosecution proved its case beyond a reasonable doubt and whether the court considered the appellant's mitigation.

14. On whether the prosecution proved its case beyond all reasonable doubt, the appellant's counsel submitted that none of the four prosecution witnesses testified that they saw the appellant inflicting injuries on the deceased. Furthermore, the body of the deceased did not have cuts on the back or neck; the injuries were not corroborated by eyewitness accounts or by PW4; further, the witnesses did not specify how long the appellant assaulted the deceased. Learned counsel further argued that the principle of strict liability should have been applied, asserting that the police conducted a superficial investigation. Further, the court's decision finding the appellant guilty was based on the post-mortem report, yet none of the witnesses corroborated the alleged injuries; as such, the offence of murder was not proven beyond a reasonable doubt.

15. On mitigation, the appellant's counsel argued that the appellant was a first-time offender who was 24 years old, young, and naive at the time of his arrest. He was not married and had no children at that time. While the only sentence for the offence of murder at the time was death, the appellant had spent approximately 17 years in custody, during which he had reformed and trained in some courses. Learned counsel also urged the court to consider the guidelines set forth by the Supreme Court in murder cases, specifically referencing the Supreme Court Case of Francis KariakorMuruatetu & 5 Another vs. Republic; Katiba institute & 4 Others [2021] KESC 31 KLR.

16. Miss Adhi Guyatu Chepkwony, learned prosecution counsel filed submissions dated 28th October 2024 on behalf of the State. In regard to whether the prosecution proved the offence of murder against the appellant to the required standard, learned counsel argued affirmatively, citing the case of

Woolmington vs. DPP [1935] AC 462 and Miller vs. Minister of Pensions [1947] 2 ALL ER 372 at 373, where Lord Denning stated as follows:

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence of course, it is possible but not in the least probable, then the case is proved beyond reasonable doubt but nothing short of that will suffice."

17. The Learned State Counsel maintained that to prove an offence of murder the prosecution must establish the facts and cause of the deceased's death, demonstrate the unlawful or guilty act (actus reus) of the accused that led to the death, and prove that the accused had malice aforethought. She supported her argument by citing the case of Roba Galma vs. Republic [2015] KECA 521 (KLR).

18. Learned counsel further asserted that the fact of the deceased's death is undisputed. The post-mortem conducted established the cause of death of the deceased as internal haemorrhage due to blunt trauma. Learned counsel further submitted that the evidence adduced proved that it was the appellant who inflicted the fatal injuries on the deceased.

19. On mens rea, she contended that the appellant was aware of the risk associated with his act against the deceased. He used a dangerous weapon to strike the deceased multiple times, which act allows for a reasonable inference that he aimed to cause serious harm or death. Since the trial court concluded that malice aforethought was established to the required standard, this Court was urged to uphold the trial court's conviction.

20. On sentencing, learned counsel argued that the trial court acted under the assumption that it was bound by a mandatory sentence, which led to a failure to exercise discretion in the sentencing process. Since the appellant is a first-time offender who has already spent a considerable amount of time in prison and based on the case of Muruatetu & Another vs. Republic (Supra), where the Supreme Court declared the mandatory nature of the death sentence unconstitutional, the respondent does not oppose the setting aside of the trial court's sentence and having it replaced with a sentence of 45 years.

21. We have carefully considered the record of appeal, the submissions by counsel, and the applicable law. As the first appellate court, we are bound to consider the evidence afresh, examine and analyse it anew, and reach an independent decision, bearing in mind that the trial court had the benefit of seeing and hearing the witnesses firsthand and making allowances for that. In the case of Okeno vs. Republic (supra), 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 e court must itself weigh conflicting evidence and draw its own conclusion (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 it's 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. 426."

22. We find that grounds of appeal can be condensed into two key questions: whether the prosecution proved the ingredients of the offence of murder beyond all reasonable doubt and whether the sentence was lawful.

23. It is old hat that the prosecution in a charge of murder has the singular task of proving the following three ingredients to secure a conviction: firstly, that the death of the deceased occurred; secondly, that the death was caused by the unlawful act of commission or omission by the appellant; and thirdly, that the appellant had malice aforethought as he committed the said act or omission. See section 203 of the *Penal Code* and the case of Nyambura & Others vs. Republic [2001] KLR 355.

24. PW1, PW2 and PW4 attested to the death of the deceased, which was affirmed by the post-mortem report; in any event, this was not disputed. The next question is the identity of the perpetrator of the offence. The trial court had before it the evidence of one single witness who testified that he saw the appellant injure the deceased. The trial court, although accused of not having warned itself of the danger of relying on a single identifying witness, the record shows that it did. In her judgement, the trial judge stated:

> " The accused denies any knowledge of the incident or knowing the deceased or PW3. This incident occurred at night about 8.30 p.m. in a butchery. PW3 said that there was a lantern in the butchery /hotel and that he had served the accused with meat for which he refused to pay. PW3 is the single identifying witness and I do warn myself of the dangers of relying on the evidence of one witness. This court has to take great care."

25. The predecessor to this Court in the often cited case of Abdalla Bin Wendo & Another vs. Reg. [1953] 20 EACA 186 considering the issue at hand stated:

> "Subject to well-known exceptions, 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 guilty, 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."

26. We have examined the judgment, and from the above extract of the same, the trial judge warned herself of the danger of relying on the evidence of one identifying witness and was convinced that since PW3 knew the appellant over time. There was a lantern illuminating the room where both were for some time; the witness was able to recognize the appellant. We also take note that PW3 did not lose sight of the appellant from the time he hit him to when he confronted the deceased, who had come to the aid of PW3, chased him and hit him. There is also evidence that the appellant remained at the scene of the crime. We, too, warn ourselves of the likely danger of relying on the evidence of one identifying witness. We are equally convinced that PW3's recognition of the appellant was positive and can be safely relied upon.

27. Having dealt with the two ingredients above, the court must be satisfied that the appellant's actions were laced with malice aforethought, as defined by Section 206 of the *Penal Code*.

Section 206 of the *Penal Code* states:

> Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstance: -
>
> a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
>
> b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> c. An intent to commit a felony;
>
> d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

28. We agree with the respondent's narrative that the appellant attacked the deceased with a weapon and inflicted such severe injuries that he ought to have known would have caused serious harm or would have caused the death of the deceased. The post- mortem revealed that the deceased had multiple injuries; he had fractures of 10 ribs, his liver was punctured, and he had a fracture of the humerus. The cause of death was said to be due to bleeding. As observed by the trial judge, the appellant used a weapon indiscriminately on the deceased, which is self- evident that he intended to cause grievous harm or death, proving the presence of mens rea.

29. Regarding the sentence, the trial judge, having convicted the appellant, sentenced the appellant to death. The appellant's counsel argued that the sentence was harsh and excessive. On the part of the respondent, it was conceded that the death sentence could be reduced following the Supreme Court's decision in Muruatetu & Another vs. Republic (supra), proposing for the sentence to be reduced to 45 years.

30. We agree with the trial court that the prosecution proved its case beyond all reasonable doubt and do not find fault with the conviction; we uphold it. As for the sentence, we take heed of recent jurisprudence regarding death sentences following the decision of the Supreme Court in Muruatetu case (supra), which states that the death sentence is not the only available sentence for the offence of murder. In these circumstances, we set aside the death sentence and sentence the appellant to a 30-year imprisonment from the date of his arrest.

DATED AND DELIVERED AT NYERI THIS 9TH DAY OF MAY, 2025.

S. OLE KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL ALI-ARONI

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JUDGE OF APPEAL

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

Signed

Deputy Registrar