Chepkwony v Republic (Criminal Appeal 10 of 2020)
[2025] KECA 1223 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KECA 1223 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 10 OF 2020

JM MATIVO, PM GACHOKA & WK KORIR, JJA

JULY 11, 2025

BETWEEN

DANIEL CHEPKWONY ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Nakuru (Prof. J. Ngugi, J.) dated 12th March 2020 in Criminal Case No. 8 of 2016)

JUDGMENT

1. Daniel Chepkwony, (the appellant) was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. It was alleged that on 14th February 2016 at Banita Centre, Solai in Rongai District within Nakuru County, he murdered his wife Esther Jemuge Chepkwony. He pleaded not guilty, and a trial ensued, pitting the prosecution's four witnesses against his testimony. At the conclusion of the trial, he was found guilty, convicted and sentenced to serve 20 years in prison.

2. He appealed to this Court seeking to overturn the said finding citing the following grounds:

   (a) the prosecution evidence was insufficient to sustain a conviction;

   (b) the postmortem report was not produced in accordance with the law;

   (c) article 50 of *the Constitution* was not complied with during the trial; and,

   (d) the learned Judge erred in dismissing his defence, yet it was not rebutted by the prosecution as required by section 309 of the *Criminal Procedure Code*.

3. The appellant also filed a supplementary memorandum of appeal dated 27th July 2024 essentially contending that the learned Judge failed to take into account the period he was in custody while

computing the sentence contrary to section 333 (2) of the *Criminal Procedure Code* and sentencing policy guidelines.

4. Kelvin Kiprotich (PW1), a son to both the appellant and the deceased testified that on the night of 14th February, 2016, he was with both his parents at their house, but he left them and went to his grandmother's house. At around 9:00 pm, he heard noise coming from his parents' homestead. He went back only to find his parents fighting. He left the scene and returned the following morning, but this time, he did not see the deceased. However, the appellant told him that she was fine. At 4:00 pm that same day, he went to the home again and upon knocking on the door, the deceased answered in a weak voice, which alarmed him. He decided to go and call a neighbour. Upon returning with the neighbour, they found the deceased had died. Upon cross-examination, he stated that when he went to check on the noise, he found the appellant holding a cane that he had used to beat the deceased, though he did not witness the beating.

5. Dr. Titus Ngulungu (PW2) performed the autopsy on the deceased's body on 18th February 2016 at Provincial General Hospital, Nakuru. He prepared the post mortem form. His findings were that the deceased's head was swollen and it had features of cyanosis; multiple lacerations on the head, face, cheeks and back of the head. The body also had bruises over the head and upper trunk. Internal examination revealed extensive clots between the skin of the head and the scalp. He also saw global subdural hematoma. He concluded that the cause of death was severe head injury attended by raised intra-cranial pressure and subdural hematoma due to blunt force trauma to the head.

6. CPL Benard Kipkoech (PW3) was the investigating officer. His investigation established that the appellant admitted assaulting the deceased after a quarrel using a tyre shoe and that when he visited the scene, he found the body lying on the bed and it had deep cuts on the forehead. After the autopsy was conducted, PW3 revisited the scene and collected assorted bloodstained clothes belonging to the deceased. He also recovered a bloodstained iron bar which he suspected to be the murder weapon.

7. Thomas Katalony (PW4) lived in the same homestead as the appellant and the deceased. He testified that on the night in question, the appellant and the deceased came home at around 2:00 am, that he heard the door being opened and the deceased asking if he was in his house. He said he heard the deceased vomiting and sounds of blows, and also, he heard the deceased say: "Daniel unaniua kila siku!" and the appellant responded "nitakumaliza!".

8. He also testified that it was common for the two to fight but on that day, he asked the appellant what was wrong, but he did not receive any answer. Early in the morning the following day, he heard the deceased calling out the appellant's name severally. When the appellant did not answer, he answered, then the deceased asked for some water, and he took it to her. He said it was at 5:00 am and it was still dark, so, he shone his torch on her and he noticed that she was lying in a pool of blood outside her house. He declined to carry her into the house, instead he called the appellant who "pulled" her into the house. At this point he left, but later that day, he learnt that she died.

9. The appellant gave a sworn statement in his defence. He testified that on the material day (i.e 14th February 2016), the deceased, who was his wife, asked him to go with her to the grandmother's house. While there, they drank 5 litres of busaa together. He testified that at around 3:00 pm he told his wife that they should go home. They did, and on arrival, he fell asleep but when he woke up at around 8:00 pm, the deceased had left the homestead. He went looking for her and he found her at a boma near the grandmother's where she was still drinking. He told her to go home with him but she resisted. A brief verbal confrontation followed but it did not turn physical; but eventually, he persuaded her to go home with him.

10. He admitted that on their way home, they met PW1 but he denied assaulting the deceased. He also denied that PW4 heard him beating his wife. He said that the deceased woke up the following day and went to milk the cows; and while milking, she fell and hit her head on a stool. He further testified that he asked the deceased if it was hurting too much and she responded in the negative so he went and got her some painkillers. He maintained that the deceased must have died from the injuries she sustained from the fall.

11. During the virtual hearing of this appeal on 28th April 2025, the appellant logged in from Naivasha Maximum Prison. He was represented by learned counsel Mr. Matoke, while learned Senior Assistant Director of Public Prosecutions, Mr. Omutelema represented the respondent. Both counsel relied on their respective written submissions.

12. In his submissions dated 16th September 2024, Mr. Matoke maintained that the prosecution did not prove its case beyond reasonable doubt because the doctor did not suggest whether blows inflicted by a human hand could have caused the injuries. It was his submission that the injuries inflicted on the deceased could not have been caused by a bare hand or blows. He argued that PW1 in cross-examination said that he did not see the appellant hit the deceased, nor did the prosecution re-examine him on this issue. He maintained that the object used to inflict the injuries on the deceased was not proved beyond reasonable doubt.

13. Additionally, Mr. Matoke argued that the bloodstained metal bar which was recovered by PW3 was not subjected to further investigations nor was the blood stains linked to the deceased. Further, the only evidence on the said item was that PW3 believed that the metal bar was used to commit the offence. Counsel argued that the metal bar was not mentioned by PW1 who was an eye witness. Further, the appellant in his defence stated that he had a stick made of Euphorbia. Consequently, it was not clear what object was used to assault the deceased and therefore the prosecution did not prove that the death was unlawfully caused.

14. Regarding malice aforethought, Mr. Matoke maintained that fighting every day seemed to have been the appellant's and deceased norm and therefore the appellant did not intend to kill her since they had a good relationship and loved drinking according to PW1, PW3 and PW4's evidence. Mr. Matoke maintained that the quarrel between the appellant and the deceased and the intoxication could have interfered with the appellant's thinking. He relied on Bakari Magangha Juma vs. Republic [2016] eKLR where this Court held that there was no malice aforethought where the appellant never made any attempt to flee the scene and his conduct was that of a person without a guilty mind.

15. Mr. Matoke also faulted the learned judge for concluding that the appellant killed the deceased yet PW1 confirmed that he never saw the appellant beating the deceased nor did PW4 see the appellant assault the deceased, but he only heard blows and when PW4 found the deceased in a pool of blood and asked her what was wrong, the deceased only asked for water and that is when PW4 called the appellant who pulled her to their house. Therefore, PW4's evidence on re-examination to the effect that he heard the appellant tell the deceased 'nitakumaliza' ought to be disregarded and treated as an afterthought.

16. Regarding the sentence, counsel stated that the appellant was arrested on 12th February 2016 and released on bond in July 2016. Mr. Matoke urged that in his ruling on sentence, the learned judge failed to order that the period the appellant was remanded be factored in accordance with section 333 (2) of the *Criminal Procedure Code* or whether the sentence was to commence from the date of conviction.

17. The respondent's counsel Mr. Omutelema opposed the appeal. In his submissions dated 9th September 2024, he maintained that the appeal lacks merit because the offence was proved to the required threshold. He rehashed the evidence on record and submitted that each and every element of the

offence was proved. Regarding malice aforethought, he cited Nebart Ekalifa vs. R. [1994] eKLR, Ernest Sami Bwire Abanga alias Onyango vs. Republic, Criminal Appeal No. 32 of 1999, and Karani & 3 Others vs. R. [1991] KLR 622 in support of what constitutes malice aforethought and argued that in this case the act of continuous and repeated attack on the deceased is sufficient to establish the presence of malice aforethought.

18. Regarding the argument that the postmortem report was not produced according to the law, Mr. Omutelema contended that Dr. Ngulungu conducted the postmortem on 18th February 2016 and he produced the report in his evidence and the appellant's advocate was accorded a chance to cross examine the doctor.

19. Regarding the alleged violation of the appellant's rights under article 50 of *the Constitution*, Mr. Omutelema maintained that the appellant failed to pinpoint the specific rights that were violated under the said article. He however pointed out that the appellant was represented by an advocate who cross-examined all the prosecution witnesses.

20. Regarding the appellant's defence, counsel submitted that the learned judge analyzed the evidence and considered the defence together with the rest of the evidence and rightly rejected the defence which was displaced by the overwhelming prosecution evidence.

21. Regarding sentence, Mr. Omutelema submitted that the aggravating circumstances of the case called for a more severe sentence.

22. Our mandate on a first appeal under section 379 (1) of the *Criminal Procedure Code* is akin to a retrial because it involves a reconsideration of the facts and the legal principles relevant to the conviction and sentence. Therefore, we are obligated to scrutinize the evidence on record to satisfy ourselves whether there was evidence to support the trial court's findings. Only then can this Court decide whether the findings appealed against should be supported. In doing so, this Court should make allowance for the fact that the trial court had an advantage which this Appellate Court cannot have, which is, seeing and hearing the witnesses and being steeped in the atmosphere of the trial. Not only does the trial court have the opportunity of observing the witnesses' demeanour, but also their appearance and whole personality. This should never be overlooked.

    The mere fact that the trial court has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as it was. Even in drawing inferences the trial court may be in a better position than the Appellate Court, in that it may be more able to estimate what is probable or improbable in relation to the particular witnesses whom it has observed at the trial. The Appellate Court should not seek anxiously to discover reasons adverse to the conclusions of the trial court. Where the Appellate Court is constrained to decide the case purely on the record, the question of onus becomes all-important, that is, whether the particular issue or issues in question was proved as required. In order to succeed, the appellant has to satisfy an appellate court that there has been some miscarriage of justice or violation of some principle of law or procedure. (See Shantilal M. Ruwala vs. R. [1957] E.A. 570 and Reuben Ombura Muma & Ano. vs. Republic [2018] eKLR).

23. Alive to the above stated mandate, we have reviewed the record, the submissions, and the authorities cited by counsel. In our view, the issues that arise for determination are:

    (a) whether the offence of murder was proved to the required standard;

    (b) whether the learned judge disregarded the appellant's defence, and,

(c) whether the appellant has established a basis for this Court to interfere with the sentence. Regarding the first issue, Section 203 of the *Penal Code* defines the offence of murder as follows:

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

24. A reading of the above section shows that to succeed in a murder case, the prosecution must prove the following ingredients:

(a) the death of the deceased.

(b) that the death was caused by an unlawful act or omission on the part of the accused.

(c) that in causing the death of the deceased, the accused had malice aforethought. (See this Court's decision on Anthony Ndegwa Ngari vs. Republic [2014] eKLR). It is within the bounds of these three elements that we shall consider all the grounds urged by the appellant in his submissions. The fact and cause of the death of Esther Jemuge Chepkwony is not disputed, therefore, the first ingredient of the offence is not in issue. What is contested is who caused the death. The postmortem was performed by Dr. Titus Ngulungu who prepared the postmortem report which he produced in Court as an exhibit. The findings were that the head was swollen and it had features of cynosis; multiple lacerations on the heard, face; cheeks and back of the head. The deceased's body also had bruises over the head and upper trunks. Internal examination revealed extensive clots between the skin of the head and the scalp and global subdural hematoma. He concluded that the cause of death was severe head injury attended by raised intra-cranial pressure and subdural hematoma due to blunt force trauma to the head. The appellant's defence was that the deceased fell while milking a cow and hit her head on a stool and succumbed to the injuries. In other words, he denied killing her. This issue turns on addressing the question, who killed her.

25. The above question can best be answered by considering the prosecution case and the appellant's defence that the deceased fell on a stool as she was milking a cow. In order to determine whether the accused's version is reasonably possibly true, a conspectus of all the evidence is required. In considering whether evidence is reliable, the quality of that evidence must of necessity, be evaluated, as must corroborative evidence, if any. Evidence of course, must be evaluated against the onus of any particular issue or in respect of the case in its entirety, that is, whether the burden of prove was discharged to the required standard. The evidence tendered by the State has to be measured against the evidence tendered by the appellant as to whether his version could be said to have been reasonably possibly true. Of course, this cannot be done in isolation, but the Court must consider the totality of the evidence before it, to come to a just decision.

26. To our mind, there is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond a reasonable doubt. The corollary is that the accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. Therefore, the correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weights so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.

27. On the conspectus of the evidence as it appears on record, we are of the view that the trial court properly evaluated the facts before it and correctly determined the existence of the ingredients of the offence of murder and arrived at the correct conclusion. Perhaps we can only amplify that the trial court holistically examined the entire evidence on the possible cause of death and weighed it against the appellant's version. We can only add that the appellant's explanation as to the cause of death is reasonably improbable compared to the doctor's version for several reasons. First, one wonders how many times she fell to sustain the multiple injuries listed in the post mortem report. Certainly, a single fall could more probably have resulted in a single injury. Second, on record is the compelling evidence of PW4 who testified that the previous night he heard blows and he also overheard the appellant telling the deceased 'nitakumaliza' (read, I will finish you). Afterwards, he found the deceased in a pool of blood and he even called the appellant who pulled her inside their house. For these reasons, we find that the trial court correctly rejected the appellant's explanation on the cause of death. It could not dislodge the doctor's findings. Therefore, the only reasonable hypothesis is that the appellant inflicted the injuries that caused the deceased's death and that his defence was correctly rejected.

28. The next prerequisite is whether malice aforethought was proved.

Section 206 of the *Penal Code* provides as follows:

> " 206. 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."

29. As the above section suggests, "malice aforethought" refers to the mental state that a murderer cultivates before the actual commission of an act of killing. This is demonstrated by evidence of a clear intention to kill or a clear intention to inflict serious bodily injury which can potentially cause death, or reckless indifference to human life during the commission of the offence. Malice aforethought can be inferred if death or grievous bodily harm probably will result from the act being contemplated. This is seen in the case where it is shown that the killer deliberately intended to kill or knew or should have known that death or serious injury was likely to result. As such, it forms a benchmark, so to speak, as far as identifying murder is concerned and brings into the fore intentional, willful, and malicious killing.

30. A reading of section 206 above leaves no doubt that the major differentiating factor is the "malice aforethought," which is the intention to kill or cause grievous harm. The evidence presented in court is always carefully examined in order to determine the intentions of the assailant at the time of commission of the offence. Circumstantial evidence, including the type of weapon used, means of assault, severity of the assault, and relationship between the offender and the victim, is essential in

proving intent. Intent is deduced from the contemplation of threats before the incident, seriousness of injuries, the location of the injuries, actions of the accused before and after the crime only to mention but some. Since, in criminal cases, it is incumbent upon the prosecution to prove the guilt or intention beyond reasonable doubt, the evidence must demonstrate that the accused either acted with premeditated intent or flagrant disregard for human life. This ensures that the crime charged is totally in agreement with the mental state (mens rea) and the actions (actus reus) of the perpetrator.

31. Based on the foregoing, there has to be intent to cause harm or death or knowledge that an act that can cause death or injury on the part of the accused person. The issue at hand will turn on whether the prosecution proved the requisite mens rea and the actus reus on the part of the appellant and malice aforethought. We have carefully re- evaluated the evidence on record. Even though no eye witness testified, at least there is credible evidence by PW4 to the effect that he heard the deceased vomiting and sounds of blows. He heard the deceased say: "Daniel unaniua kila siku!" and the appellant replied "nitakumaliza!" Credible evidence is defined as evidence that a reasonable person would believe is reliable, trustworthy, and worthy of belief, considering the surrounding circumstances. (See the Black's Law Dictionary, 10th Edition). It is evidence that a fact- finder could reasonably conclude is true, based on its consistency with other evidence, the witness's demeanor, and other factors. We find no reason to doubt the evidence of PW4.

32. Earlier, we found that the appellant's explanation as to the cause of the injuries sustained by the deceased is totally improbable. He was the only person at the scene. He pulled the already seriously injured deceased into the house after he was called by PW4 who had responded to her desperate call. The vicious manner in which the injuries were inflicted are sufficient to establish the existence of malice aforethought. The words "nitakumaliza" sufficiently demonstrate predetermined intention to finish her. We therefore find that the evidence on record irresistibly pointed to the appellant as the one who committed the offence and all the ingredients of the offence of murder were proved. Therefore, his defence that the deceased fell on a stool was shallow and it was properly rejected.

33. The appellant had in his grounds raised an issue concerning the postmortem report that was produced by the doctor. However, Mr. Matoke never addressed the said issue in his submissions. Nevertheless, we have considered the postmortem report and the manner in which it was adduced in evidence, and in all fairness, we find that it was properly produced.

34. Also, the appellant alleged violation of his rights under article 50 of *the Constitution*. However, this ground was not urged in the appellant's submissions. In any event, we have scrutinized the entire record, and we find no process failures throughout the proceedings.

35. Lastly, the appellant laments that the period he was in custody was not considered while computing his sentence of 20 years imprisonment. As the record shows, the learned judge did not specify when the sentence was to start running nor did he factor the period the appellant was in custody as required by section 333 (2) of the *Criminal Procedure Code* which provides:

> "Subject to the provisions of section 38 of the *Penal Code* (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

36. This Court in Ahamad Abolfathi Mohammed & Sayed Mansour Mousavi vs. Republic (Criminal Appeal 135 of 2016) [2018] KECA 743 (KLR) (Crim) (26 January 2018) stated that in accordance with the above section, trial courts are obligated to ensure that the period spent in custody is

considered while computing the sentence imposed. The above provision is couched in mandatory terms. Unfortunately, many trial courts never apply it while passing sentence. The appellant was in custody from the date of his arraignment in court on 17th February, 2016 until he was released on bond on 11th July 2016, a period of four months and 24 days. By dint of section 333 (2) of the *Criminal Procedure Code*, the trial court was obliged to take into account the said period, therefore, the failure to do so was a breach of the said section.

37. Arising for our analysis and conclusions arrived at on each and every issue discussed above, it is our finding that the appellant's appeal against conviction is dismissed for being devoid of merit. We also affirm the sentence of 20 years, save that in computing the prison term of twenty (20) years, the period the appellant was in custody as highlighted above shall be taken into account.

DATED AND DELIVERED AT NAKURU THIS 11TH DAY OF JULY, 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed.

Deputy Registrar.