Kaviha v Republic (Criminal Appeal 59 of 2020)
[2025] KECA 1210 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KECA 1210 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 59 OF 2020

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JULY 4, 2025

BETWEEN

JUMAA KAVIHA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the Judgment of the High Court of Kenya at Malindi (Nyakundi, J.) dated 22nd July 2020 in HCR. Case No. 1 of 2016)

JUDGMENT

1. The Appellant, Juma Kaviha, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.

2. The information was that, on 26th September 2015 at 20:00 hours at Konjora location Kilifi County, the Appellant, jointly with others, murdered Kahindi Baya Thoya alias Panga (the deceased).

3. He pleaded not guilty and the matter proceeded to hearing where the prosecution called 11 witnesses.

4. The prosecution evidence before the trial court was that, according to Kazungu Kahindi Baya (PW1), the son of the deceased, on 25th September, 2015, he attended a burial of a relative at a neighboring home; that, the following day whilst at his home at about 8.00 p.m, the Appellant and one Kahindi came to look for his father (the deceased); that the Appellant, who was riding a motorcycle, left with Kahindi and the deceased as pillion passengers; and that, as he was about to leave home for the adjacent home where he attended a burial, he heard screams accompanied by the following words "Fulani anachomwa huko (chini)" meaning that someone was being burnt here.

5. PW1 further testified that he rushed to the scene where a big crowd had gathered; that, on the ground, he saw the deceased's legs; that he was covered with a blanket and his body was on fire; that he ran off

to call the village elder and, thereafter, the police were informed; and that the police visited the scene the following day and made several arrests, including the Appellant, who is his uncle.

6. Furaha Kahindi (PW2), the deceased's son, was at home with the deceased when the Appellant came looking for the deceased. He asked to talk to him for a moment, whereupon the deceased left with the Appellant who told them, "Twaja naye hivi baba yenu" meaning we are just coming with your father; that he later learnt of his father's death a few minutes after leaving with the Appellant, but did not go to the scene.

7. Zawadi Barisa (PW3), told the court that, on the date of the alleged incident at about 8.00 p.m. he was at home with his siblings and his father when the Appellant came in the company of one Kaviha and demanded to see the deceased. The deceased who was asleep woke up and left with the Appellant and his brother riding a motorcycle. After a while, he heard people screaming and mourning that the deceased had been killed.

8. Boniface Kahindi Baya (PW4), also a son of the deceased who resides in Mombasa stated that, on 26th September, 2015, he travelled home to attend the burial of a relative. Later that evening, he spent some time visiting and discussing with his father, the deceased. As they discussed the allegations going round in the village that the deceased had killed one neighbor, the Appellant together with another person then came to their home and asked to go with his father. They left on a motorcycle and, after some time, he heard screams. The information he received was that his father was burnt to death. He confirmed seeing the body of his father.

9. On the material day, Jumwa Kahindi (PW5), the wife of the deceased, had gone to her home for her grandmother's burial. On her return in the evening, she did not find her husband, but the children told her that he has gone to treat a neighbor's child; that the child died and that she went to view the body. While there, the deceased and a group of youths came in carrying a jug of water demanding that the deceased treat the deceased child and restore him to life. The group left with the deceased, and she came to learn that the deceased was killed. She denied that her family had a grudge with the Appellant as to warrant a revenge killing of the deceased.

10. Ndurya Thoya Baya (PW6), identified the body of the deceased to the pathologist who performed the postmortem at Kilifi District Hospital.

11. Harrison Safari Shehe (PW7), owned the motorcycle registration number KMDE 282L which the Appellant hired as the rider to carry out a Boda Boda business. On 30th September 2015, he received information that the Appellant had been arrested in connection with the death of the deceased.

12. On 26th September 2015, Alfonzo Kahindi (PW8), visited the scene of murder to ascertain the cause of death. Accompanied by Rodger Sichenje and Elvis Kazungu, it was PW8's evidence that, on arrival at the scene, he saw the charred body of the deceased and the rising fumes from the fire. He confirmed that police officers were called in to investigate the matter.

13. PW9, Dr. Azrah Mohammed of Kilifi Hospital testified on behalf of Dr. Kadivane on the postmortem examination carried out on 8th October, 2015. The examination established that the body was burnt beyond recognition, and beyond concludable post mortem findings.

14. On the night of the incident, Baraka Mwazayi (PW10), was at a funeral when the DJ announced that a child called Baraka had died. They rushed to the child's home and, while viewing the body, they saw the deceased being brought by the Appellant whilst holding a jug of water which he was to pour on the body of Baraka (the deceased child) so that she can rise from the death to life; and that the deceased was undergoing a cleansing ceremony to absolve him from the allegations that he had

bewitched the deceased child. After the ritual was performed and the child failed to rise from death to life, the Appellant and other youths angrily took away the deceased. He PW10 followed them but did not manage to catch up with the Appellant and his group. When he was at a distance of about 7 metres from the actual scene, he saw the Appellant syphone petrol from the motorcycle which he used to light the fire to burn the deceased. It was the intense fire which burnt the deceased to death. He further added that the Appellant was well known to him as they lived in the same village.

15. Cpl. Fatuma Mathenya, (PW11), investigated the murder incident involving the Appellant. After recording the witness statements, she was satisfied that the murder was committed by the Appellant and his brother with others not before court. On the basis of the evidence, she recommended a charge of murder to be preferred against the Appellant

16. When placed on his defence, the Appellant gave an unsworn statement in which he denied committing the offence. To his recollection, on 26th September 2016 he went about the daily routine and later visited a neighbor's home to console them for the loss of a family member. The following day, as a boda boda operator he ferried mourners to and from to attend the burial. He was only informed of the murder of the deceased when the police arrested him in the course of his duties. He denied any knowledge of or any participation in the deceased's murder.

17. The trial Judge upon considering the evidence was satisfied that the prosecution had proved the ingredients of the offence of murder against the Appellant and proceeded to convict and sentence him to serve 45 years imprisonment.

18. Aggrieved, the Appellant filed this appeal on grounds that: the learned Judge was in error in convicting and sentencing him without considering that the sentence imposed was harsh and excessive as there was no direct evidence linking him as the perpetrator of the murder; in failing to appreciate that malice aforethought in the killing of the deceased was not established; and in failing to consider his defense.

19. Both the Appellant and the Respondent filed written submissions. When the appeal came up for hearing on a virtual platform, learned counsel for the Appellant, Mr. Wagoro, submitted that from the testimony of PW1 and every other witness who was present at the deceased's home at the time he was allegedly picked up by the Appellant, the deceased was to return home after treating the deceased child, Baraka. Counsel submitted that the killing of the deceased was carried out by the group of youths who were provoked because the deceased did not bring the child, Baraka, back from death to life; and that it was an established fact that the deceased was accused of being a witch and the Prosecution witnesses all believed that he was responsible for the child's death. Counsel relied on the case of Katana Karisa & 4 Others v Republic,[2008] KECA 270 (KLR) to argue that the defence of provocation by witchcraft is legally available to an accused despite the fact that it was not raised during trial.

20. It was further submitted that the trial court relied on circumstantial evidence to convict the Appellant and sentence him to 45 years' imprisonment without taking into consideration the years that he was in custody prior to the judgment. It was also submitted that malice aforethought was not established.

21. On their part, the learned Assistant Deputy Public Prosecutor Ms. Mutua for the Respondent submitted that the trial court extensively and elaborately analysed the circumstantial evidence adduced against the Appellant and correctly concluded that it was sufficient to convict the Appellant. Counsel submitted that the trial Judge rightly found the existence of malice aforethought and considered the Appellant's defence and that, therefore, the conviction was sound.

22. On the sentence, counsel submits that the trial Court, in its extensive Sentencing Notes, enumerated the proper case law and the sanctity of life before passing sentence on the Appellant.

23. This being a first appeal, this Court is required to submit the evidence as a whole to a fresh and exhaustive examination, weigh out any conflicting evidence and arrive at its own independent conclusions. See Kiilu & Another v Republic [2005] 1 KLR.

24. After considering the record of appeal and the submissions, the issues that arise are: whether the prosecution proved the offence of murder to the required standards; whether the defence of provocation by witchcraft was established; and whether the sentence was appropriate.

25. As to whether the prosecution proved the offence of murder to the required standards, under Section 203 of the *Penal Code*, murder is defined thus: "Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder." The definition enlists 4 crucial ingredients for the prosecution to prove beyond reasonable doubt. These are:

a) the fact of the death of the deceased;

b) the cause of such death;

c) proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons; and

d) proof that the unlawful act or omission was committed with malice aforethought.

26. The above stated ingredients were identified by this Court in the case of Roba Galma Wario v Republic [2015] eKLR where it was observed:

> " For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."

See Anthony Ndegwa Ngari v Republic [2014] eKLR.

27. On the fact of the death of the deceased, there cannot be any doubt that this was established by the post mortem report as well as the evidence of the prosecution witnesses. His burnt body was seen lying on the ground by PW1, PW4, PW5 and PW8. That said, what this Court is required to ascertain is whether the evidence adduced was sufficient to establish that the Appellant caused the death of the deceased and, if so, whether he had malice aforethought in so doing.

28. On the cause of death, the evidence of PW10 was that he saw the Appellant, a person who was well known to him, pour petrol on the deceased and set him alight. This was direct evidence that pointed to the Appellant as the person responsible for the deceased's death, which would lead to the conclusion that the prosecution proved that the Appellant murdered the deceased.

29. In his defence, the Appellant's counsel submitted that the Appellant was provoked when the deceased failed to bring the child back to life, and that the trial Judge did not consider the defense of provocation arising from the belief that the deceased was a witch who had bewitched the deceased child; that the trial Judge did not consider their defense of provocation arising from their belief that the deceased was a witch.

30. As held by Bosire, J. (as he then was) in the case of Republic v Chibatsi and Another [1989] KLR 333:

> " Mere belief in witchcraft does not constitute a circumstance or excuse or mitigation for killing a person believed to be a witch or wizard."

> When there is no immediate provocation, witchcraft as a provocative act can only a vail an Accused as a defence where the victim is shown to have done an act in the presence of the Accused which he believed was an act of witchcraft against him and he was thereby angered as to be deprived of his self-control."

See also Patrick Tuva Mwanengu v. Republic [2007] eKLR.

31. Concerning the allegations of witchcraft, the established legal principle is, and has remained, that, the belief in witchcraft does not justify deviation from law by infliction of punishment by a person or persons on a suspected witch, except in cases where the accused has been put in such fear of immediate danger to his own life that the defence of grave and sudden provocation has been proved. See Katana Kaka alias Benson & 2 others v Republic [2017] eKLR.

32. In the case of Mtawali Amini Ngawa & 7 others v Republic [2018] KECA 288 (KLR), this Court held:

> " ...although this defence will be dependent on the peculiar facts of each case, there must be evidence that the parties involved believed in witchcraft; there must be evidence also that the deceased was believed to practise witchcraft and further that he was responsible for the death of a person or had committed other identifiable acts of witchcraft. Mere allegations that a person is a witch will not suffice to accord an accused person the defence in question. There must be firm basis laid that the deceased had actually committed acts of witchcraft and strong belief that the said acts had resulted in the death of the deceased." (emphasis ours)

33. In the case of Mwanatsongo Muhenda Chengo & 3 others v Republic [2017] KECA 530 (KLR), this Court held:

> " The defence of provocation by witchcraft was not available to an appellant merely because he comes from a community that believes in witchcraft; that there must be evidence of circumstances directly affecting the appellant from which it could be readily concluded that on account of his belief in witchcraft, he was provoked to murder the alleged witch; that there ought to be some proof that prior to the commission of the offence there were either illnesses or deaths of immediate members of the family that made the appellant believe that those illnesses and deaths were caused through witchcraft and that the deceased was responsible for them; that what is clearly murder cannot be excused merely on the ground of general repute in which the deceased was regarded as a witch; that there is no room in law and the courts will not countenance the use of violence by those who consider themselves village vigilantes or witch busters to unleash terror on anybody they suspect to be a witch even when he or she has not harmed them in any way. Those involved and who do not meet the foregoing criteria commit criminal acts and deserve to be punished and not praised."

34. The afore-cited authorities on the defence of provocation in cases of witchcraft notwithstanding, at no time during trial did the Appellant raise the defence of provocation on account of belief in witchcraft. His evidence was a mere denial of commission of the offence, and more specifically that he was not at the scene of the deceased's murder. This defence has been raised by counsel for the Appellant in his submission. Be it as it may, the only evidence before the Court was that there were 'murmurs' that the deceased was a witch, although such evidence did not emanate from the Appellant. The murmurs were unsubstantiated and, fell far short of the threshold set for invocation of the defence of provocation on account of belief in witchcraft. As such, this ground is unfound and has no merit.

35. Having dispelled the defence of provocation, did the Appellant murder the deceased with malice aforethought? Section 206 of the *Penal Code* defines malice aforethought as:

> " 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."

36. In the case of Hyam v DPP [1974] A.C. the Court held interalia that:

> " Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm."

37. The post mortem report revealed that the death of the deceased was due to severe burns. Evidence was adduced by PW 10 that the Appellant poured petrol on the deceased and set him ablaze, which is obviously indicative of the intention to harm or cause grievous harm. From the injuries inflicted on the deceased, it is clear that the Appellant intended to cause the death of, or to cause grievous harm to, the deceased with the result that, malice aforethought was proved to the required standard. See Katana v Republic (Criminal Appeal 48 of 2021) [2024] KECA 463 (KLR).

38. On sentence, the Appellant's complaint is that the period when he was in custody prior to delivery of the Judgment was not taken into account at the time of pronouncement of the Judgment by the trial court.

39. The Appellant was sentenced to 45 years' imprisonment. At the time of the pronouncement, the date of commencement of the sentence was not indicated. A consideration of the sentence discloses that the Appellant was arraigned in court on 14th October 2015. On 16th December 2016, he was granted bail and released from custody. On 26th September 2019, his bail was cancelled as he was found to have absconded. The Judgment was rendered on 22nd July 2020. It would therefore mean that the total computation of the period spent in custody was 1 year and 11 months. Section 333 of the Criminal

    Procedure Code is clear that the period which an accused had been held in custody prior to being sentenced must be taken into account when computing the sentence. Unless the trial court, whilst sentencing the accused states and sets out the effective date of the period on the sentence meted out, the legal implication of the proviso to Section 333 (2) of the *Criminal Procedure Code* is that the period spent in custody forms part of the eventual sentence.

40. The question concerning the computation of the period spent in custody was addressed in the case of Bethwel Wilson Kibor v Republic [2009] eKLR where it was held that:

> " By proviso to section 333 (2) of the *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 27th September, 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence".

41. Further, The Judiciary Sentencing Policy Guidelines, 2023 specifies:

> " The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person has been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

42. In this case, since the trial court did not expressly exclude the period which the Appellant had spent in custody before sentencing, it becomes apparent that, pursuant to the proviso to Section 333 (2) of the *Criminal Procedure Code* that the period of 1 year 11 months should be taken into account in computing the Appellant's sentence.

43. In sum, the appeal against conviction and sentence is dismissed, save that, in computing the sentence, the period that the Appellant spent in custody during the trial should be taken into account.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR.