Musyoka & another v Republic (Criminal Appeal 35 of 2021)
[2024] KECA 102 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KECA 102 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 35 OF 2021

AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA

FEBRUARY 9, 2024

BETWEEN

CHARLES MUIA NDELEVA ..... 1ST APPELLANT

DANIEL MUSYOKA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Machakos (P. Nyamweya, J.) dated 10th October, 2017 in HC. CR.C. No. 23 of 2010)

JUDGMENT

1. Two persons, Charles Muia Ndeleva who is the appellant here and Daniel Musyoka were arraigned before the High Court of Kenya, Machakos where they were charged in the Information with the offence of murder contrary to Section 203 and 204 of the *Penal Code* particulars being that on 30th March, 2010 at Manooni in Kakutha location of the then Makueni District they jointly murdered Elijah Kioko Kimia (deceased). They pleaded not guilty and were convicted in the trial where the prosecution called six witnesses. They gave sworn defences. They were sentenced to death in the Judgment delivered by Nyamweya, J. (as he then was) on 10th October, 2017.

2. We were informed through a document under the hand of the Officer in Charge, Kamiti Maximum Security Prison that Daniel Musyoki had died in prison while serving the said sentence.

3. This is a first appeal by the appellant who is dissatisfied with the said findings of the trial court. It is our duty in such an appeal to re- appraise the evidence and come to our own conclusions on that evidence but bearing in mind that we lack the advantage of the trial Court of seeing and hearing the witnesses

and must give due allowance for that. This mandate was considered in the oft-cited case of *Okeno v Republic* [1972] EA 32 where it was pronounced on that mandate:

> " 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."

4. The star prosecution witness was Patrick Mwongela Somba (PW4 – Mwongela) who was 17 years old when he testified before the Judge. He narrated how, on 30th March 2010, after leaving school, he was sent by his mother to go to the bush to collect firewood. When he reached the bush which was in a hilly area he saw the deceased who was leading his cows home. He then saw the appellant and the other accused who died emerge from downhill and they held the deceased and pushed him to the ground. All the three – deceased, appellant and Daniel Musyoka – were his neighbours. According to him:

> " ... Charles (1st accused) sat on the deceased's chest and Daniel (2nd accused) was hitting the deceased. I could see the hand of the 2nd accused going up and down but I don't know what was in his hands. From the distance where I was I could not see what was in the hands of the 2nd accused. The first accused was also blocking my view on and off as he was moving from side to side while pinning down the deceased who was trying to free himself. I crouched down where the attackers could not see me. I was uphill and I could see downhill where the attack was taking place ...".

5. According to him the attack went on for 30 minutes after which he saw the two accused carry the body of the deceased and throw it down the hill. He went home and was in shock and did not report the incident to anyone until the next day when the body was found. He informed his mother of what he had witnessed the previous day who accompanied him to Sultan Hamud Police Station where a report was made.

6. Joseph Mwaki Kimia (PW1 – Mwaki), a brother of the deceased attended Makueni District hospital mortuary on 7th April, 2010 and identified the body of the deceased to Dr. Macharia who performed post mortem on the body. He (Mwaki) observed injuries on the body. The accused were his relatives (nephews). According to him there was a land dispute involving his family where the children of the two wives were feuding about subdivision of family land, the subdivision was being spear-headed by the deceased.

7. Back to the post-mortem report – the same was produced by Dr. Emmanuel Lopoisha (PW6) on behalf of Dr. Macharia who had since proceeded for further studies. He testified that the body had bruises on right temporal region, right zygomatic (near cheek bone) region, left side of neck, left shoulder and right bust. There was extradural haemotama on the right temporal (internal bleeding on right side of brain) and subsequent clotting and there was dislocation of C4 and C5 region (neck bones) and cause of death was cardio respiratory arrest secondary to extradural haematoma and respiratory failure secondary to spinal and head injury.

8. Daniel Nyanzi Kimia (PW2 – Nyanzi), brother to the deceased, was asleep in his house on the morning of 31st March, 2010 when he was woken up by repeated mowing of cows. He went to investigate and was surprised to find the deceased's cows in the compound of another brother, Kimindo. According to him the deceased and Kimindo had differed over an unstated matter. On the way to Kimindo's homestead (they were all neighbours) he stumbled on the lifeless body of the deceased and his screams alerted his wider family and neighbours who came to the scene. He reported to the Assistant Chief, Titus Mutungi Kiriu (PW3) who came to the scene; police were informed, they came to the scene and collected the body and re- arrested the two accused who had been apprehended by their family and neighbours as suspects in the killing of the deceased.

9. The said Assistant Chief who visited the scene observed the presence of cows but did not see any sign of struggle but he noted bruises on the hands of the deceased.

10. The other prosecution witness was Jeras Muthusi Kisingo (PW5 Muthusi), a retired assistant chief who received death report in the early morning of 31st March, 2010. He went to the scene and observed that the body of the deceased was lying face down and there was blood from the nostrils. He knew both accused and witnessed their being arrested. He confirmed that there was a land dispute involving the family of the deceased.

11. That was the case made out by the prosecution and the trial Court found that a case had been made out for the appellant to answer. The appellant in sworn defence narrated how he woke up on 30th March, 2010 and together with his wife they did tended to their farm upto 1 p.m. He later that day sold some maize and visited a certain home and went back home in the evening where he slept. The following morning he helped his children prepare to go to school but when the children left one of them came back immediately to report that, on reaching the hill, he had seen many people. When he (the appellant) went to investigate he found the deceased lying near his house with cows tethered nearby. Police came and removed the body to the mortuary but he (the appellant) was detained with his co- accused and another at Sultan Hamud Police Station and later charged in Court. He denied killing the deceased.

12. As we have seen the appellant and his co-accused were convicted. The appellant is before us in this first appeal.

13. There are 6 grounds of appeal in a homegrown document titled "First Appellant's Written Submissions". It is said that the Judge erred in law and fact by failing to appreciate that the prosecution did not prove ingredients of the offence of murder namely actus reus and mens rea against the appellant; that the Judge erred in law and fact by not noting that the prosecution did not procure the attendance of an essential witness to corroborate the evidence tendered; that the Judge erred in law and fact by failing to appreciate that prosecution case was inconsistent and did not meet the requirements of section 124 of the *Evidence Act* and that this led to a miscarriage of justice; at ground 4 it is said that the Judge erred in law and fact by not finding that the prosecution did not meet the legal standard of proof required in law to make a conviction. The appellant says in the penultimate ground that the Judge erred in law and fact by disregarding the appellant's defence and, finally, that the Judge:

> "... in light of the new constitution, the death sentence that was meted upon by the trial Court is not in tandem with developed jurisprudence in the recent years in our criminal justice system, since its excess (sic), harsh, unfair and unreasonable."

14. We are asked to allow the appeal by quashing the conviction and setting aside the sentence.

15. When the appeal came up for hearing before us on a virtual platform on 19th July, 2023 the appellant was present from Kamiti Prison and was represented by learned counsel Miss Michuki while learned

counsel Mr. Kimanthi appeared for office of Director of Public Prosecutions. Both sides had filed written submissions. In a highlight of the same counsel for the appellant submitted that the appellant's fair trial rights had been violated because there was no interpretation of the proceedings on 5th November, 2012. According to counsel the appellant only understood Kamba language and he did not understand the proceedings of that day. Further, that there was only one identifying witness and the trial court should not have relied on his evidence. Counsel submitted that the evidence of the single witness was not corroborated and this violated section 124 of the *Evidence Act*. Counsel further submitted that the appellant had raised an alibi defence which the trial Judge had failed to consider. On sentence it was counsel's submission that the sentence of death awarded was not deserving in the circumstances. Counsel concluded submissions by stating that the appellant was denied an opportunity to mitigate.

16. In opposing the appeal the respondent submitted that the offence of murder was proved to the required standard; that the appellant was identified as the person who assaulted the deceased and fact of death was proved by the doctor. According to counsel malice aforethought was proved by the seriousness of the injuries inflicted which showed that the appellant wanted to kill the deceased or cause him grievous harm. On the allegation that there was no interpretation of the proceedings counsel submitted that proceedings were taken in Kiswahili language and that the appellant was represented by a lawyer in the trial. On the effect of section 124 of the *Evidence Act* counsel submitted that a trial Court was entitled to convict on the evidence of a single witness if it found such evidence to be truthful and believable. On the alibi raised it was counsel's submission that the same was raised too late in the trial thus denying the prosecution an opportunity to investigate the same and that the alibi defence had been considered by the trial Judge. Counsel for the respondent conceded that the mandatory nature of death sentence in murder charges had since been the subject of interpretation of the Supreme Court of Kenya.

17. In a rejoinder counsel for the appellant stated that the appellant had not been accorded a proper opportunity to mitigate.

18. The appellant says that his fair trial rights were violated because there was no interpretation of proceedings on 5th November, 2012. We have looked at the record and proceedings of that day which begin at page 46 of the record. It shows that the appellant was present in court and was represented by a lawyer, Mutia. The prosecutor gave an opening address and the first prosecution witness (Mwaki) testified in Kiswahili language. The appellant did not raise the issue that he could not understand the proceedings and his lawyer would have raised the issue if it was an issue at all. Mwaki was cross-examined by the appellant's lawyer and we cannot see any prejudice that the appellant could have suffered where proceedings were in Kiswahili language and the appellant was represented by a lawyer. This complaint has no basis and is dismissed.

19. The appellant says that the trial Court was wrong to rely on the evidence of a single witness to found a conviction.

20. As we have seen Mwongela testified how he had gone to the bush to fetch firewood when he witnessed the appellant and his co-accused wrestle the deceased to the ground and assault him for 30minutes and thereafter throw the body downhill where it was found the next morning. He stated that it was 5.30 p.m. and that he witnessed the whole incident in broad daylight and that he knew the assailants and the deceased who were all his neighbours. The trial Judge considered the circumstances of the said identification and considered case law on that issue including the holdings of this Court in *Kiilu & Another v Republic* [2005] 1 KLR 174 and *Maitanyi v Republic* [1986] KLR 198 where it was held that a fact may be proved by testimony of a single witness but such evidence should be treated with

great care, subject to well known exceptions. The trial Judge found in the Judgment on the issue of identification:

> " When it comes to the evidence of recognition by a single identifying witness, the applicable law is that that evidence of recognition is stronger and more reliable than the visual identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other as stated in the case of *Anjononi vs Republic* [1980] KLR 59. In Wanjohi & 2 Others vs Republic [1989] KLR 415, the Court of Appeal held that while recognition is stronger than identification but an honest recognition may yet be mistaken, as explained in R vs Turnbull and Others [1976] 3 All ER. 549 as follows:
>
> "Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made...
>
> All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger."

21. The Judge found that Mwongela saw the appellant and his co- accused attack the deceased; they were all neighbours and Mwongela's evidence was that of recognition and it was reliable. We agree. Mwongela's evidence was direct evidence on what he had witnessed in broad daylight as the deceased was viciously attacked by the appellant and his co-accused, all who he (Mwongela) knew very well as they were all his neighbours. It was a case of recognition which as stated in the *Anjononi* (supra) case:

> " ... "recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

22. The appellant says that the offence of murder was not proved to the required standard. Section 203 of the *Penal Code* provides for the offence of murder; Section 204 thereof gives the prescribed penalty while section 206 on malice aforethought provides as follows on what the prosecution needs to prove in a case of murder:

> " 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."

23. Witnesses testified before the trial Court how the appellant and his co-accused were seen beating the deceased to death; the body of the deceased was found the following morning and was identified by a

brother of the deceased at the mortuary for post-mortem. The doctor testified on the cause of death. It was proved to the required standard that the appellant and his co-accused attacked the deceased and inflicted grievous injuries on him leading to his death. The attack was vicious and malice aforethought was proved.

24. On the complaint that alibi defence raised was not considered we have perused the Judgment of the High Court. The Judge considered that defence and found that it had been raised quite late in the trial thus denying the prosecution an opportunity to test it. The Judge considered that line of defence and made the following conclusion:

> "It is thus my finding that the evidence of alibi did not dislodge the prosecution evidence as to the 1st and 2nd Accused Persons being at the scene of the crime and their attack on the Deceased."

25. The alibi defence was duly considered but the Judge did not find any merit in it. We agree with that finding. The appellant was seen by Mwongela at 5.30 p.m. assaulting the deceased and he could not have been anywhere else but at the scene of murder.

26. It is submitted for the appellant that he was denied an opportunity to mitigate. The record shows that after conviction on 10th October, 2017 the appellant's lawyer, Mr. Muumbi stated that the appellant had "... something to say in mitigation" and the appellant then addressed the Court as follows:

> " I only heard of the case in this court for the first time and of how the deceased was murdered in this court, and it is my mother who is related to the deceased who is my uncle. I could not be involved in their land dispute."

27. That is how the appellant chose to give his mitigation with the guidance of his lawyer. It is therefore wrong to say that the appellant was denied an opportunity to mitigate.

28. On the issue of sentence the Judge stated that being a conviction for the offence of murder her hands were tied as the only penalty prescribed was the death sentence. Counsel for the appellant submits that the sentence was harsh and excessive in the circumstances and this is conceded by the respondent who cites the holding by the Supreme Court in *Francis Kariako Muruatetu & Another v Republic* [2007] eKLR where that issue was considered.

29. The Supreme Court of Kenya was asked in that case to answer the question whether it was right or constitutional for Parliament to prescribe a minimum sentence. That Court returned that it was unconstitutional for Parliament to do that. The trial Court is therefore entitled to consider the circumstances of each case and award a sentence befitting those circumstances.

30. We note that in the case before the trial Court the appellant and his co-accused were nephews of the deceased. The whole family was feuding over how to subdivide the land that had been left undivided by the patriarch of the family who had two wives. There was evidence before the trial Court that the deceased was spear-heading subdivision of the land and it appears that he was doing it in a way that did not please some family members. This could have led to the attack that caused his death. The appellant attacked his uncle in such a vicious way that led to his death. That kind of action should not be condoned. There was evidence by the two assistant chiefs that there were efforts by elders and the local administration to resolve the land issue. The appellant and his co-accused should have let those efforts to resolve the issue come to fruition but they chose to take the law into their own hands leading to the serious consequences that ensued leading to the charge of murder.

31. Considering all the circumstances that obtained in the case and in view of the jurisprudence arising from the Supreme Court in the Muruatetu (supra) case we think that the appellant should serve an appropriate custodial sentence. The appeal on conviction has no merit and is dismissed. We set aside the death sentence awarded. The appellant will serve twenty-five (25) years imprisonment from 19th April, 2010 when he was first presented before the High Court of Kenya, Machakos.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

A.K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR