Wera v Republic (Criminal Appeal 118 of 2018)
[2024] KECA 137 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KECA 137 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 118 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 9, 2024

BETWEEN

GEORGE ODHIAMBO WERA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an Appeal from the Judgment of the High Court of Kenya at Siaya, (Makau, J.) dated 2nd February, 2017 in HCCRC. No. 21 of 2015)

JUDGMENT

1. The appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* in Siaya Criminal Case No 21 of 2015. The particulars of the offence were that on the 30th day of September, 2014 at Central Sakwa Location, Bondo District within Siaya County, he murdered Susan Awino (deceased).

2. The appellant pleaded not guilty to the charge and the prosecution called seven (7) witnesses to prove its case. The learned Judge (Makau, J) found that a prima facie case had been established against the appellant at the close of the prosecution case and placed him on his defence. In his defence, the appellant gave sworn testimony and called one witness.

3. In a judgment dated and delivered on 2nd February, 2017, the trial court found that the prosecution had proved its case beyond reasonable doubt and convicted the appellant as charged. The learned Judge, then, sentenced him to suffer death as provided for under section 204 of the *Penal Code*.

4. The appellant is dissatisfied with the sentence imposed and has appealed to this Court. He has listed two grounds of appeal as follows:

    a. That the learned Judge of the High Court erred in law and in fact by imposing the mandatory death sentence upon the appellant; and

b. That it was a misdirection on the part of the Learned Trial Judge by imposing a harsh and excessive sentence taking into account the Mitigation on record as well as the circumstances under which the offence was committed.

5. Both the appellant and the state filed written submissions. Ms. Omollo, learned counsel, appeared for the appellant during the plenary hearing while Mr. Okango, learned prosecution counsel, appeared for the state. Both of them relied on their filed submissions.

6. It is readily obvious that the appeal is only against sentence. The appellant's counsel confirmed as much during the plenary hearing. It is a first appeal. The role of this Court is to re-evaluate evidence, assess it, weigh it as a whole and reach our own independent conclusions. In doing so, we are required to bear in mind that we neither saw nor heard the witnesses testify, for which we must make allowance. See *Okeno v Republic* [1972] EA

32. Accordingly, our remit permits us to review both the legality and severity of the sentence.

7. The circumstances in which the murder took place are as follows. The deceased was the appellant's wife. She attended a funeral of a community member on 29th September, 2014 at Nyangoma. After the funeral, she spent the night at her sister's house. The following morning, the appellant went to get her. He was apparently furious at her for spending the night away. He slapped her several times in the presence of the sister. Later on, as they went home, PW2, Paul Tabu, saw him viciously assault her again: he slapped her; he kicked her; then he violently pushed her to the ground; she collapsed on the ground in a heap. When the deceased tried to stand up, he picked up a stick and assaulted her with it. PW2 saw the appellant beat up the deceased all the way home even as she struggled to walk due to the injuries already inflicted. Later, at around 3:00pm, screams rent the air, from the home the appellant shared with the deceased. By the time neighbours and community members arrived at the home to assist, they found the deceased lifeless. The appellant had literally assaulted her to death.

8. During mitigation, the court was informed that the appellant was a first offender; that he was remorseful for what he did; and that he had young children he was taking care of. He pleaded for a lenient sentence.

9. In sentencing him to death, the learned Judge stated:

> " I have taken into account mitigation in favour of the accused and the circumstances under which this offence was committed. I have also taken into account that the sentence provided for an offence of murder is death and that the deceased died at the hands of husband, this (sic) being one of many domestic violence matters in the country. My hands are tied and I have no alternative other than to sentence the accused as provided for by law. I accordingly sentence the accused to death."

10. The appellant argues, and correctly so in our view, that, in view of our emerging jurisprudence, it is no longer the case that the sentence for murder is the mandatory death sentence prescribed in section 204 of the *Penal Code*. We note that at the time of sentencing, as the learned Judge points out, death was considered as the only possible sentence for the offence of murder. That changed with the Supreme Court's decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR. Mr Okango, learned counsel for the respondent, conceded that the appellant's sentence ought to be reviewed in light of the current jurisprudence. We agree.

11. Mr. Okango urges us that even as we review the sentence, we impose a stiff sentence given the aggravating circumstances in this case. He points out that this is an instance of severe gender-based

violence. He cites our recent decision in *Frank Turo v Republic*, Criminal Appeal No 157 of 2017 (unreported) (Judgment delivered on 6th October 2023), where this Court expressed itself forcefully about gender-based homicides and femicides thus:

> " 42. However, we note that this was a horrific gender- based violence perpetrated on a woman who had sought refuge in her own mother's home. The Appellant, an intimate partner, pursued her at probably the space she felt most secure at. He then proceeded to mete out atavistic violence on her in the presence of not only her mother, but, by his own reckoning, at least one of their children. The excuse that the Appellant gave for his vicious attack smack of probably the two most harmful beliefs that perpetuate violence against women in our part of the world: that women are expected to be submissive and not answer back when spoken to by their husbands; and that husbands have a right to exercise coercive control over their wives. The offence is aggravated by the fact that it was committed in the Deceased's mother's home where she had sought refuge; and in reckless disregard of the children of the Appellant and the Deceased who witnessed the attack. We turn our face firmly against the anachronism that violence, even fatal violence as in this case, is an acceptable currency of spousal interaction.
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> 43. The upshot is that the circumstances here point to a particularly disturbing homicide borne of gender- based violence; the kind of toxic masculine behaviour that requires vehement discouragement. Consequently, given all these factors, we hereby substitute the death sentence imposed with a sentence of imprisonment for thirty (30) years."

12. These words apply with particular force to the case at hand. The appellant here viciously and gratuitously assaulted his wife for the assumed reason that she attended a burial and spent the night at her sister's house. The assault was relentless – lasting almost the entire day. It was also done with impunity and depravity: when a witness attempted to intervene, the appellant is said to have asked with apparent righteous indignation, whether any person has a right to "separate" him when he is beating his wife. He, then, assaulted the witness causing him to flee.

13. The upshot is that all factors considered in this case, a sentence of thirty (30) years imprisonment is warranted. We, therefore, hereby set aside the death sentence imposed by the High Court and substitute thereto a prison term of thirty (30) years. The appellant was in remand between 14th October, 2014 when he was arraigned at the Kisumu High Court and 4th April, 2016 when he was released on bail. By dint of section 333(2) of the *Criminal Procedure Code*, this period shall be deducted from his sentence.

14. Orders accordingly.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR