Douglas v Republic (Criminal Appeal 66 of 2019)
[2024] KECA 319 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KECA 319 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 66 OF 2019

W KARANJA, J MOHAMMED & LK KIMARU, JJA

MARCH 22, 2024

BETWEEN

JOSEPH MUIMI DOUGLAS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Meru (Lesiit, J.) delivered on 23rd October, 2014 in H. C. CR. C. No. 45 of 2009)

JUDGMENT

1. This is a first appeal arising from the judgment of the High Court of Kenya at Meru, (Lesiit, J., as she then was) delivered on 23rd October, 2014, in High Court Criminal Case No. 45 of 2009.

2. A background of this appeal is that the appellant was charged before the High Court with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence alleged that on 19th August, 2007, at Kawiru Location Igembe District within the Eastern Province, the appellant murdered John Karungu Mwinzi (the deceased). The appellant pleaded not guilty to the charge. The prosecution called four witnesses, while the appellant was the only defence witness.

3. The brief facts of the case as presented by the prosecution was as follows: PW1, Julius Mutabari, told the Court that he met the appellant at Murera Market on the morning of 19th August, 2007. It was his testimony that the appellant inquired on the whereabouts of the deceased, after which he informed PW1 that he was going to kill the deceased. PW1 testified that he warned the deceased of threats made by the appellant against his life. PW1 stated that during that afternoon, he heard screams emanating from Murera Market. When he got to the scene, he saw the body of the deceased lying on the ground. He informed local authorities who called the police. They arrived at the scene and collected the deceased's body. PW4, Reuben Mwenda, was at the market on the material day. He told the court

that at about 6.00 p.m., he saw the appellant chasing the deceased while carrying a panga. He stated that the deceased ran towards a house, but before he could open the door to the said house, the appellant, who had caught up with him, stabbed him with a panga on his chest. The deceased fell down to the ground. PW2 stated that he died on the spot.

4. PW3, Dr. Koome Guantai, gave evidence on behalf of Dr. Macharia, who conducted a post mortem on the deceased's body on 7th September, 2009. It was his testimony that the deceased had a penetrating wound on left side of his chest. He stated that the cause of death was cardio respiratory arrest secondary to damage to the heart and great blood vessels due to a penetrating chest injury. PW2, Lawrence Kilonzo Mwinzi, identified the body of the deceased during the post mortem.

5. After the close of the prosecution's case the learned Judge found that the appellant had a case to answer. He was placed on his defence. He gave sworn evidence. He admitted that the deceased was known to him. He told the Court that on the material day of 19th August, 2007, he was at home all day with his wife, and that he did not leave his house at any moment. It was his testimony that PW1 had a grudge against him due to a prior disagreement regarding purchase of miraa which occurred in 2005, and therefore his testimony was false. He asserted that PW1 and PW4 conspired to testify against him in this matter.

6. After full trial, the appellant was convicted as charged and sentenced to death.

7. Aggrieved by his conviction and sentence, the appellant lodged the instant appeal. He advanced three grounds of appeal in his memorandum of appeal. The appellant faulted the learned Judge for relying on the uncorroborated evidence of a single identifying witness, whose observations were made under unfavourable conditions, that did not support a positive identification to be made. The appellant was aggrieved by the learned Judge's finding that the prosecution had proved its case beyond any reasonable doubt, yet the prosecution failed to call material witnesses necessary to prove its case. Lastly, the appellant faulted the learned Judge for dismissing his alibi defence, which he contended was not dislodged by the prosecution.

8. The appeal was canvassed by way of written submissions, which were duly filed by both parties. It was the appellant's submission that the evidence of identification by PW4, who was the only identifying witness, was not reliable. The appellant submitted that the conditions existing at the time the incident is alleged to have occurred were unfavourable for a positive identification to be made. He asserted that the incident took place in a market, and that the prosecution failed to prove that PW4's observation was not impeded by the crowd of people ordinarily present at the market. Further, it was the appellant's submission that PW4 did not inform the court the distance between his house and the scene of crime, and therefore his evidence was insufficient to sustain a conviction. To this end, he cited the case of R vs Turnbull [1976] ALL ER 549.

9. The appellant faulted the prosecution for failing to avail "Mwari' as a witness, yet PW4 stated that the deceased was stabbed as he tried to enter Mwari's house, and that the said Mwari witnessed the incident. He submitted that the appellant's arrest, two years after the incident had occurred, was not explained as the investigating officer was not availed to give evidence before court. It was his view that his alibi defence was not dislodged by the prosecution, and that it cast doubt on the prosecution's case. He urged this Court to allow his appeal as prayed.

10. The appeal is contested by the State. Ms. Nandwa, learned prosecution counsel was of the view that the evidence of PW4, who witnessed the incident, was corroborated by that of PW1, who testified that the appellant had informed him of his intention to kill the deceased. She submitted that the trial court properly warned itself of the danger of relying on the evidence of a single identifying witness, and that the learned Judge found that the evidence of PW4 was credible. Learned prosecution counsel urged

that the evidence of identification by PW4 was that of recognition, and not identification of a stranger. She asserted that the witnesses who were availed by the prosecution were sufficient to establish the case against the appellant. She submitted that going by the nature of the injury sustained by the deceased, the intention of the appellant was to kill the deceased. She submitted that his alibi defence was dislodged by the prosecution, as the appellant was placed at the scene of crime. It was her submission that the sentence meted by the trial court was appropriate in the circumstances. She invited us to dismiss the appeal for lack of merit.

11. This being a first appeal, our mandate as was aptly set out in the case of Okeno vs. Republic [1972] EA 32, is as follows:

> "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 vs. 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."

12. In light of this mandate, we have carefully considered the record of appeal, the submissions by both parties, and the applicable law. The issues arising for our determination are:

    i. Whether the evidence of identification was sufficient to sustain a conviction;

    ii. whether the prosecution failed to call material witnesses; and

    iii. whether the alibi defence raised by the appellant was cogent.

1. PW4 was the sole eye witness in this case. He told the court that he was outside his house, located at the market, when he saw the appellant chasing the deceased while holding a panga. He witnessed the appellant stab the deceased on his chest with the said panga, after which the deceased fell to the ground and died on the spot. The evidence of identification by PW4 was that of recognition. This Court in the case of Cleophas Otieno Wamunga vs. Republic [1989] eKLR observed as follows with respect to evidence of identification:

> "...it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility or effort before it can safely make it the basis of a conviction."

14. PW4 stated that he had known the appellant for five years prior to the incident, and that they lived in the same area within the market. The appellant contended that the conditions for a positive identification to be made were not present in this case because PW4 did not state the distance between his house and the scene of crime, and that the incident occurred in a market which, ordinarily, is full of people. It is our considered view that PW4 positively identified the appellant. The incident occurred during the day at about 6.00 p.m. PW4 told the court that at some point he tried to intervene and stop the appellant from harming the deceased when the appellant turned on him and started being

aggressive towards him. It is, therefore, our considered view that PW4 was in close proximity to the appellant when the incident occurred, and since the appellant was well known to PW4, it cannot be said that there was a case of mistaken identity.

15. PW4 was the only identifying witness. In Peter Kifue Kiilu & Another vs. Republic [2005] eKLR, this Court citing Abdalla bin Wendo and Another vs. Republic [1953], 20 EACA.166 stated:

> "Subject to certain well-known exceptions, it is trite law that a fact may be proved by 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 guilt, 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 probability of error."

16. Other than the evidence of the eye witness, the prosecution adduced other circumstantial evidence against the appellant. Though he did not witness the incident, PW1 met the appellant on the morning of the material day when the deceased was stabbed. He told the Court that the appellant was asking about the deceased's whereabouts, and that he informed him of his intention to kill the deceased that day. PW1 further testified that the appellant was carrying a panga. The appellant was well known to PW1. PW1 stated that he had known the appellant for about five years. The appellant was later that day seen by PW4 running after the deceased while holding a panga, and stabbing the deceased on the chest. In the circumstances, we see no reason to impugn the finding on identification made by the learned Judge.

17. According to the post mortem report, the deceased's cause of death was cardio respiratory arrest, secondary to damage to the heart and great blood vessels due to a penetrating chest injury. The report indicated that the deceased suffered a penetrating chest wound on the left side of his chest, approximately 7cm in length.

18. The other issue which was raised by the appellant for determination by this Court is whether the prosecution failed to call material witnesses necessary to prove its case. It was the appellant's submission that the prosecution failed to call 'Mwari' who PW4 stated was present when the deceased was stabbed by the appellant, or other members of the public present at the market on the material day. It has previously been held by this Court that the prosecution is not required to call a particular number of witnesses, but rather, witnesses sufficient to establish its case to the required standard of proof beyond any reasonable doubt. See Benjamin Mwangi & another v. Republic [1984] eKLR. We hold that evidence on record irresistibly pointed to the appellant, and no one else, as the person who stabbed the deceased, leading to his death. The appellant alluded to the fact that there existed a grudge against him by some of the prosecution witnesses, particularly PW1 and PW4. It was instructive that the appellant did not raise this issue during trial in the High Court. By purporting to raise it at this appellate stage, we are of the considered opinion that it is an afterthought.

19. The appellant raised an alibi defence that he was not at the scene of crime at the time the deceased was stabbed. We agree with the assessment by the learned trial Judge that the evidence adduced by the prosecution against the appellant was overwhelming, and that it dislodged his alibi defence. On the morning of the material day the incident occurred, the appellant, who was seen in possession of a panga, had threatened to kill the deceased. Later that day, an eye witness placed him at the scene of crime and witnessed the appellant stab the deceased with a panga. The deceased died on the spot.

The cause of death indicated on the postmortem report was proximate with injuries sustained by the deceased as testified by the eye witness PW4. It was also not disputed that the deceased was well known to the appellant, and that they worked together at the material time.

20. From the nature of injuries sustained by the deceased, the learned Judge correctly inferred that the assault on the deceased was meant to cause death or grievous harm. We find that the appellant was properly convicted by the trial court.

21. With regard to the sentence, the appellant was sentenced to death upon conviction. The learned trial Judge noted that the death sentence, at that time, was the mandatory sentence for the offence of murder. However, the Supreme Court's decision in Francis Karioko Muruatetu & Another vs Republic [2017] eKLR outlawed the mandatory nature of the death penalty in murder cases and declared it as unconstitutional, and struck down the penal proviso in Section 204 of the Penal Code to the extent that it prescribed a mandatory death sentence upon conviction for murder.

22. Learned Prosecution Counsel submitted that the sentence meted upon the appellant was commensurate with the offence.

23. We have taken into consideration the appellant's mitigation before the trial court. The appellant is a first offender. In his mitigation before the trial court, he stated that he was remorseful. He told the court that he was 28 years old, and married with one child. This Court has also taken into account the aggravating circumstances of this case in that the appellant used a panga to stab the deceased on his chest, and that she died instantly as a result of the injuries sustained.

24. Having considered the circumstances of this case, the appellant's mitigation notwithstanding, this Court is of the view that the period that the appellant has spent in prison is not sufficient in light of the gravity of the offence that he committed.

25. The upshot of the above is that we dismiss the appeal against conviction but allow the appeal against sentence. We hereby set aside the death sentence that was imposed upon him, and substitute therefor a sentence of thirty (30) years imprisonment, to take effect from the date when the appellant was arrested.

DATED AND DELIVERED AT NYERI THIS 22ND DAY OF MARCH, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR