**Yaola v Republic (Criminal Appeal 16 of 2017)**
**[2024] KECA 348 (KLR) (22 March 2024) (Judgment)**

Neutral citation: [2024] KECA 348 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAKURU**

**CRIMINAL APPEAL 16 OF 2017**

**FA OCHIENG, LA ACHODE & WK KORIR, JJA**

**MARCH 22, 2024**

**BETWEEN**

**JULIUS SINDANI YAOLA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the judgment of the High court of Kenya at Naivasha (Meoli J) dated 24th February, 2017) in HCCR No. 45 of 2015)***

## JUDGMENT

1. The 8th of September 2015 was a day like any other for Sameri Koitumet Kiragie (the deceased). He went by the appellant Julius Sindani Yaola's house and invited a fair lady by the name of Esther Lenguya Napanu, (PW1) who lived with the appellant to come with him to the house of one Nangura aka Longuran for a drink of the local brew known as busaa. The deceased and the appellant lived a few hundred metres from each other. Seated outside Nangura's house was a guest called Joel Musoka Vitiro, whom the appellant was hosting. He would later become the appellant's co-accused.

2. In the course of consuming the brew, an argument arose between the deceased and the appellant who had come along. The appellant demanded to know the purpose of the deceased's visit to his house. The argument quickly degenerated into a fight. The deceased, an old man was thrown to the ground. The co-accused tried to intervene but was unable to separate the two and he let them alone and went into Longura's house.

3. The appellant having felled the deceased, sat on his chest and continued to pummel him. Finally, he pulled out a dagger and stabbed the deceased severally until the deceased became inert. The appellant then called out for Longura who came forth with the co-accused. The three men carried away the deceased into Longura's shack. Later in the night the three men returned to the appellant's house and spent the night there. They swore PW1 to silence about the events of the day.

4. The deceased was never seen alive again after that day. His family, including his two sons Simon Konana Sameri (PW3) and John Kaelo Sameri (PW4) learnt of their father's disappearance and travelled to Kedong in search of him on 12th September, 2015. They inquired about the fight that had broken out between the appellant and the deceased and the appellant admitted that he had quarreled with the deceased. He however stated that he left for his home and therefore, did not know the whereabouts of the deceased.

5. With the help of the members of the public PW3 and PW4 carried out searches, starting with the appellant's home. Close to the appellant's home a grey cap (Exh 4), identified as belonging to the deceased was found. The search party escorted the appellant to Maai Mahiu Police Station where a report of the disappearance was made. The police joined the search for the deceased on 13th September 2015 and on 14th September 2015, the pair of shoes the deceased was wearing (Exh 5), was found buried in a hole close to Longura's shack. A shallow grave was soon spotted beside the shack and when it was dug out, it yielded the deceased's half burnt remains wrapped in a gunny bag. The body bore several injuries.

6. The dagger which PW1 identified as the one used in the fight was retrieved from the house of the appellant by CPL Justus Parsalat (PW6). PW6 also led the police in removing the body.

7. Titus Ngulungu (PW2) the Pathologist at Provincial General Hospital Nakuru Forensics, conducted the post mortem examination on the body of the deceased on 18th September 2015 at Naivasha. Noting the multiple cuts and fractures on the body, he concluded that death was due to head and vascular injuries, due to combined blunt and sharp force trauma to the head and neck.

8. The appellant and Joel Musoka Vitiro were thus, jointly charged with murder contrary to Section 203 as read with Section 204 of the *Penal Code*. It was stated that on the 8th day of September, 2015 at Kedong Ranch, Naivasha Sub- County within Nakuru County, they jointly murdered Sameri Koitumet Kiragie. They both denied the charge. A full trial followed before Meoli J at Naivasha High Court in which the evidence set out above was adduced.

9. When placed on their defence Joel Musoka Vitiro gave a sworn statement in which he basically denied committing the offence.

   The appellant on the other hand testified without oath and stated that he lived in Kedong and the deceased resided close by. Both dealt in charcoal making, while Longura sold busaa and PW1 was the wife to Longura. The appellant stated that on the material date he went to drink busaa at Longura's house. He left for his home at 5.00pm and did not go out again. He asserted that he did not see the deceased on the material date.

10. Joel Musoka Vitiro was sentenced to 3 years imprisonment, which he served and was released. The appellant was given a life sentence with which he was aggrieved and which gave rise to this second appeal. Longura the third man in the trio is said to have escaped and is still at large.

11. The appellant's appeal was hinged on only one ground to wit, that the learned Judge erred in law and misdirected herself by sentencing him to death for the offence of murder as a mandatory sentence, which was excessive in the circumstances. That the mandatory nature of the death sentence for the offence is unconstitutional.

12. The case was prosecuted by way of written submissions. M/s Felix Ochieng' Orege Advocate filed submissions dated 8th of June 2023 on behalf of the appellant. Counsel submitted that the death sentence imposed upon the appellant by the learned Judge was manifestly harsh and excessive and urged the Court to set it aside. He relied on the Supreme Court decision in the case of *Francis*

*Karioko Muruatetu & another v Republic* [2017] eKLR, wherein the Supreme Court observed that the mandatory nature of Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Counsel submitted that the Supreme Court went on to declare the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code unconstitutional.

13. Counsel also cited the case of *Juma Anthony Kakai v Republic* [2018] eKLR where the Court of Appeal took cognizance of recent developments in the Law in this area and applied it to the case before it, particularly because it was advantageous to the appellant.

14. Counsel pointed out that in the instant case the learned Judge, bound by the law and before the rendering of the decision by the Supreme Court in the Muruatetu case, sentenced the appellant to the only sentence provided for, which is the death sentence. That his mitigation though tendered was not considered and that failure to consider the appellant's mitigation during sentencing owing to the mandatory dictates of Section 204 of the *Penal Code* denied the appellant a fair trial.

15. In his submissions counsel included the appellant's mitigation in which he stated that he was a 75-year-old single father of children, with the youngest child at the time being 5 years old. That he was also stated to be a first offender and that he was remorseful for his actions. That he has been in custody since he was convicted on 24th February, 2017, a period of 6 years. That he is now an old man of 80 years of age and cannot cope with the prison life and taking into consideration his age, the death sentence meted upon him was too harsh and excessive.

16. Counsel further submitted that the 6 years the appellant has spent in prison have reformed him. He prayed that the death sentence be set aside and substituted with a lesser sentence, or in the alternative the Court should consider the 6 years spent in prison as time served.

17. The Respondent's submissions dated 13th of June 2023 were filed by M/s Jackline Kisoo, Senior Prosecution Counsel, in the Office of the Director of Public Prosecution. In rebuttal counsel submitted that Section 203 and Section 204 of the Penal Code under which the appellant was convicted and sentenced provide that:

> " 203: Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."
>
> 204: Any person convicted of murder shall be sentenced to death."

The penalty provided for under section 204 is therefore a lawful sentence prescribed by the law and has not been repealed.

18. Counsel for the respondent referred the Court to the case of *Francis Karioko Muruatetu* (*supra*) stating that it was the mandatory nature of the death sentence provided for under section 204 of the Penal Code that was declared unconstitutional. That the Supreme Court clarified that the validity of the death sentence was not disturbed as contemplated under Article 26 (3) of the *Constitution*.

19. Counsel urged that Article 26 (1) of the *Constitution* provides that every person has the right to life. This right is however not absolute and has limitations. The State can limit this right in accordance with written law. Article 26 (3) of the *Constitution* provides that a person may be deprived of the right to life to the extent authorized by the *Constitution* or other written law. The law in this case is the Penal Code which has provided for the death penalty in the aforementioned section.

20. Counsel contended that the only rights that are guaranteed, absolute and non-derogable are those found under Article 25 of the *Constitution* and the right to life is not among them. She submitted

therefore that the death penalty in murder cases remains to be a lawful sentence and one that should be upheld in this case. Further, that the appellant's mitigation before the trial court was considered as recorded at page 39 of the record of appeal thus:

> "Accused 1 is a father of five. Mother deceased and children dependent on him. He is remorseful. He seeks leniency. He is 75 years old and ready to reform."

21. Counsel also stated that the appellant's mitigation was further considered at page 41 of the record of appeal as follows;

> "Both accused herein were treated as first offenders. Mr. Kanyi made mitigation on their behalf, which I have noted. The first accused herein was the key actor in the murder of the deceased, after which he arranged for the disposal of the body.... Each of them must bear responsibility for their actions...."
>
> Counsel urged that the record as laid out indicates that the sentence meted upon the appellant was not couched in mandatory terms. The trial court exercised its discretion in sentencing the appellant to death.

22. Counsel submitted that it should be noted that the decision in the landmark Muruatetu case declaring the mandatory nature of the death sentence unconstitutional, was delivered after the death sentence was passed in the appellant's case. Therefore, should the court find that discretion was not available to the trial court at the time, the respondents urged the Court to balance the appellant's mitigation against the aggravating circumstances of the case. That an innocent life was lost gruesomely and the death sentence meted upon the appellant served as sufficient retribution for the unlawful killing.

23. As the first appellate Court, we are empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that we did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd.& others* [1968] EA 123 and in *Peters v Sunday Post Limited* [1958] E.A. page 424.

24. Section 379 (1) (a) & (b) of the *Criminal Procedure Code* provides for this Court's mandate and jurisdiction to entertain an appeal against sentence from the High Court.

25. Section 203 of the *Penal Code* under which the appellant was charged defines the offence of murder and requires proof of certain elements of the offence beyond reasonable doubt, to found a conviction under this section. The ingredients necessary to prove the offence of murder are: proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect and that the unlawful killing was with malice aforethought.

26. In this appeal we were not called upon to determine whether the ingredients of murder were satisfied, the appellant having abandoned the appeal on conviction and only urged his appeal on sentence. We have however, balanced the aggravating circumstances of the case that militated against the appellant with the mitigating factors that spoke in his favour to establish whether the sentence was appropriate.

27. The Court is not precluded from handing down the prescribed mandatory sentence if it is appropriate in the circumstances of a particular case. In order to determine whether or not it was appropriate, the Court has to consider the mitigation, if any, as well as the aggravating factors. This Court stated this

in the sexual offence decision of *Joshua Gichuki Mwangi v Republic*, Nyeri Criminal Appeal No 84 of 2015 thus:

> "We emphasise that this Court is alive to the fact that some accused persons are obviously deserving of no less than the minimum sentences as provided for in the *SOA* due to the heinous nature of the crimes committed. And they will continue to be appropriately punished...
>
> On the other hand, there are definitely others deserving of leniency and this is the leeway we are asserting that ought to be at the disposal of courts..."

28. The aggravating factors in the case before us are as were urged by M/S Kisoo for the respondent, that an innocent life was lost in a gruesome manner and the death sentence meted upon the appellant served as sufficient retribution for the unlawful killing. Indeed, we observe that the attack on the deceased was brutal. PW1 who was the eyewitness testified that she saw the appellant assault the deceased and stab him with a knife and that the attack lasted about 3 hours. The deceased suffered extensive injuries going by the observations of PW2 the pathologist in the post mortem report. He sustained multiple cuts on the head and a fracture on the right lower jaw. He lost the incisors in the upper jaw and had a long incision wound on the right hand with severed carotid arteries. His jugular too was severed.

29. The mitigating factors on the other hand are to be found in the appellant's plea that he was a 75-year-old single father of children, with the youngest child aged 5 years old at the time the offence was committed. That he was a first offender, was remorseful for his actions and has already been in custody for a period of 6 years. Lastly that he is now an old man of 80 years of age who cannot cope with prison life.

30. Consequently, having considered the circumstances of this case and taking into consideration the period he spent in custody, we set aside the appellant's life sentence and substitute therefor a sentence of 20 years.

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

**F. OCHIENG**

**.....**

**JUDGE OF APPEAL**

**L. ACHODE**

**.....**

**JUDGE OF APPEAL**

**W. KORIR**

**.....**

**JUDGE OF APPEAL**

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

Signed

DEPUTY REGISTRAR