



**Ouma v Republic (Criminal Appeal 104 of 2018)
[2024] KECA 323 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KECA 323 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 104 OF 2018
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
MARCH 15, 2024**

BETWEEN

ELIJAH OUMA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Homa Bay (D.S. Majanja, J.) dated 6th May 2016 in HCCRA No. 37 of 2014)

JUDGMENT

1. The appeal arises from the conviction and sentence in Homa Bay High Court Criminal Case No. 37 of 2014 where the appellant Elijah Ouma, pleaded not guilty to the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code; the particulars of the offence were that on the night of 3rd and 4th September at Kakelo Dudi Sub location, Kakelo location, Rachuonyo South District, Homa Bay County, he murdered his wife Lilian Auma. He was tried, convicted and sentenced to death.
2. Aggrieved with both the conviction and sentence, the appellant has now appealed to this Court. This being a first appeal, this Court is mindful of its duty as 1st appellate court. this duty was well articulated by this Court in *Erick Otieno Arum v Republic* [2006] eKLR as follows:

“It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e) a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of



seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same.”

3. In keeping with this role, we set out in brief the evidence that was presented at the trial. The appellant had married the deceased as a 2nd wife, and lived with her in the homestead of his mother, Wilkister Otero, PW3. PW3 told the trial court that on the day in question, the appellant got home at 4pm from his place of work, chatted a little with the deceased who gave him a tin of maize; then left again, as he lived where he was working. PW3 later had supper with the deceased and her children, then went to sleep. At about midnight, she heard the appellant shouting: ‘I want to kill somebody.’ She woke up went to the appellant’s door and called the deceased who responded but would not open the door. The witness then saw the appellant kick the door to get into the house and once in he started beating the deceased. The two of them fought and even got outside the house. PW3 went back into her house, but as the fighting continued, she ran out; and onto the road screaming for help but no one responded. The witness then remained outside and hid in the bushes. Just before daybreak; she went into the appellant’s house and found the deceased lying on the floor covered with a bed sheet. The witness noted that the deceased had cuts on the arms and legs. Next to the body was a broken stool, and a jembe as well as a broken chair.
4. PW3 went to inform the assistant chief, Jacktone Ogweno Achien’g, PW1, about what had transpired, and PW1 told her he already was aware of the incident. She then went to the home of DW2, who employed the appellant as a farm hand, and found the appellant there. The police arrived shortly thereafter and arrested the appellant. PW1 then also arrived with another team of police officers and she accompanied them to take the body of the deceased to Rachuonyo District Hospital Mortuary. PW3 later attended the post mortem on 12th September 2014 where she identified the body of the deceased. When PW3 questioned the appellant, he made reference to a panga which he had left at his work place; it was thus retrieved.
5. John Ouma Awino, PW5, the appellant’s uncle confirmed hearing the appellant shouting that he was going to kill someone, but he did not pay much regard, as the appellant had issues with his wife; and was fond of shouting at night. He also heard PW3 shouting while running. In the morning as he was going to the shamba, he met a young child who informed him about the death of the appellant’s wife; he rushed to the scene and found the body lying dead with injuries.
6. The area Assistant Chief Jacktone Ogweno Achieng received a call at around 11pm on the night in question from a person in Wasweta Village; and which he confirmed from PW5 that there were screams from Mzee Ogwocha’s homestead in Ratandi village; and that it was the appellant beating the wife; a common occurrence which would always end up in reconciliation. The next day, PW5 informed him that the appellant had killed his wife. He mobilised key contacts to help in apprehending the appellant. Upon apprehension and interrogation by PW1, the appellant stated: “shetani alinidanganya.” The appellant also informed him that he had used a panga which he had kept where he was sleeping at his employer Jeremiah, DW2’s home. The said panga was identified in court as exhibit 1.
7. PW2, Hesbon Otieno, a village elder in Kakelo, testified that at about 6am on 4th September 2014, PW1 called him to inform him that the accused had killed his wife and requested him to find out where the appellant was. Since he knew that the appellant worked for DW2, he went there. He did not find him at home. As PW2 called PW1 to give him an update of events, he learnt that the appellant had already been arrested. He confirmed that the appellant later directed him to recover the murder weapon at the home of DW2.
8. PW4 Dr. Peter Ogola conducted the post mortem and noted that the deceased had fractures on both bones of the right and left legs and the right lower arm, multiple cut wounds on the head and multiple



- bruising on face and trunk. The significant finding on internal examination was a fracture on the left side of the head which resulted in bleeding within the skull; the 2nd spinal bone was dislocated from the 3rd one while the spinal cord was compressed at the neck; the cause of death was severe head injury and spinal compression that resulted from fracture and dislocation.
9. PW7, Corporal Joseph Keter visited the appellant's house, observed blood stains in the house; and confirmed that the incident took place in the bedroom. He also interviewed PW3 who told him that the couple had frequent quarrels, and confirmed that PW1 had handed to PW7 a panga which was produced as an exhibit. On cross examination, PW7 stated that the appellant had said he found another person, Abah Ratemo, in his house, although no one in the area seemed to know such a person.
 10. The appellant, in his sworn defence, denied murdering the deceased, maintaining that it was PW1 who informed him about his wife's death when he was arrested at Mikai. He also denied knowledge of the panga produced in court; and stated that he had differences with his mother over land issues as he wanted his share so as to set up his own homestead.
 11. Jeremiah Owande Orodí, DW2, confirmed that the appellant was his employee. He did not see the appellant on the morning of 4th September 2014 when he delivered milk as he had gone to till his land. He only saw the appellant after he had been arrested at Mikai; and it was his wife who told him that the appellant did not sleep at his workplace but rather worked and left at night.
 12. The trial court noted that the fact and cause of death was not in dispute as PW1, 3 and 5 confirmed that the deceased was found dead in her house, and they all observed multiple injuries on the deceased's body. The said injuries were also confirmed by the post-mortem examination performed by PW4. The trial court, having considered the prosecution case, was satisfied that the ingredients of the offence of murder had been satisfactorily met.
 13. The trial court was also satisfied that the testimony of PW3 placed the appellant at the locus in quo at the time the act was committed; and was clear that it was the appellant who committed the unlawful act that caused the deceased's death. On the assertion by the appellant in his defence that he found another person in his house, this was rejected as the only person in the house was the deceased as testified to by as PW3 and 5 both of whom heard the appellant express his intention to kill.
 14. As to whether the injuries were inflicted with malice aforethought, the learned Judge considered the evidence of PW4 regarding the nature of injuries found on the body of the deceased and noted that the injuries inflicted were so vicious, resulting in multiple fractures and head injury leading to her death, and that this demonstrated an intention to cause death within the meaning of section 206(a) of the Penal Code. Having considered all the evidence in its totality, the trial court found the appellant guilty of the offence as charged and sentenced him to death.
 15. The appellant has raised 3 grounds in the memorandum of appeal dated 8th May 2023: that his alibi defence was not considered; his right to a fair trial was violated as the trial Judge did not give him an opportunity to tender his mitigation before sentence; and that the death sentence meted out was unconstitutional. However, at the hearing the appellant abandoned the ground on alibi, concentrating his appeal on sentencing alone. He contended that the trial Judge violated his right to a fair hearing having failed to give him a chance to mitigate before sentencing, and secondly that the death sentence was unconstitutional.
 16. With regard to the severity of sentence, Section 379 (1)(a) &(b) of the Criminal Procedure Code provides that this Court has jurisdiction on first appeal to entertain an appeal against sentence from the High Court. The appellant draws from the case of *Francis Muruatetu & Another v Republic* [2017]



eKLR, which gave sentencing guidelines with regard to mitigation before sentencing in murder cases at paragraph 71 as;

- a. Age of the offender,
- b. Being a first offender,
- c. Whether the offender pleaded guilty,
- d. Character and record of the offender,
- e. Commission of the offence in response to gender-based violence,
- f. Remorsefulness of the offender,
- g. Any other relevant factor.

In the same case, the Supreme Court stated the following with regard to the mitigation by the accused before sentencing:

“it is during mitigation, after conviction and before sentencing, that the offender’s version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or in the converse impose the death penalty.”

17. On the death sentence, the respondent recognizes the jurisprudence in *Francis Karioko Muruatetu & Another v Republic* (supra) as regards the unconstitutionality of the mandatory death sentence; and concedes that the death sentence imposed herein should be set aside as the appellant never gave any mitigation. The respondent proposes that the appellant’s plea for a chance to give his mitigation before a Judge, be allowed; and the matter be remitted to the High Court for re-sentencing hearing where the appellant will give his mitigation.
18. On perusal of the proceedings in the High Court, we find no mention of any mitigation on the part of the appellant; nor mention of a pre-sentence report from probation services, or a victim impact statement. This Court in, *Chai v Republic* (Criminal Appeal No.30 of 2020) [2022] KECA 495 (KLR) (1 April 2022) held that the two holdings of the Supreme Court in the Muruatetu case underscores the importance of receiving and considering mitigating circumstances, and also heeding to the applicable sentencing guidelines, even though the latter are a guide. To justify a death sentence the court should have spoken to the mitigating factors, showing in black and white what the court considered. In the absence of any demonstration of factors that could have led to such a sentence then the appellant was prejudiced.
19. This Court finds that the trial court did not follow the guidelines set out by the Supreme Court with regards to mitigation and in doing so, tied its hands from using its discretion in making an informed decision with regard to sentencing. As a consequence, we allow the appeal on the sentence to the extent that the death sentence is set aside, and the matter is hereby remitted to the High Court for re-sentence. The appellant shall be produced before the High Court within 7 days from today for appropriate directions.
20. The appellant shall be produced before the High court within 7 days from today for appropriate directions.

DATED AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF MARCH, 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.

DEPUTY REGISTRAR.

