Aberi v Republic (Criminal Appeal 104 of 2020)
[2024] KECA 244 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 244 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 104 OF 2020

MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA

MARCH 8, 2024

BETWEEN

JUMA NYAYO ABERI ALIAS MUSTAFA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Mutuku, J.) dated 18th October, 2014 in HC. CR. A. No. 81 of 2014)

JUDGMENT

1 The appellant, Juma Nyayo Aberi alias Mustafa, was charged at the High Court of Kenya at Nairobi with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*, particulars being that on 22nd August, 2014 at Industrial Area in Nairobi, he murdered Edward Onsongo.

The prosecution called 10 witnesses in support of its case while the appellant gave a sworn statement in his defence and called no witnesses. On 18th October 2018, the High Court gave judgment and found the appellant guilty as charged and sentenced him to death. Being dissatisfied with the judgment by the High Court the appellant is now before us on a first appeal. Our mandate on first appeals allows us to undertake a review of facts as well as matters of law; to appraise the whole case and come to our own conclusions of the case that was before the trial court. We must defer to the fact that the trial court had the advantage of hearing and seeing the witnesses as they testified and observe their demeanor, an advantage we don't have here. That mandate has been the subject of various judicial pronouncements by this Court and the High Court. In the oft-cited case of *Okeno v Republic* (1972) EA 32 this is what this Court stated of that mandate:

> " An appellant on a first appeal is entitled to except the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R [1957], EA 366) 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] EA 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] EA 424."

2. We shall revisit the evidence and appraise it afresh to reach our own conclusions as is required by our mandate on first appeal.

Rogers Omenya (PW1-Omenya) told the Court that on 22nd August 2014, he received a call in the middle of the night from his friend Nimrod Okemwa who told him that the deceased had been assaulted. Accompanied by a colleague they went to the scene and Omenya saw the deceased lying on the ground in a pool of blood. Omenya called the deceased's aunty Esther Kemunto (PW2-Kemunto) and informed her that Edward was dead. There was light from electricity at the scene and he could see that the deceased's eyes had been gouged out. They reported the matter to Lunga Lunga Administration Police Post and the appellant was apprehended by members of the public who brought him to the scene, where he was arrested by police. Omenya identified a knife at the scene and a big stone both of which were stained with blood. He said that he knew the appellant who was his neighbor. In cross- examination he said that his house is 100 meters from the appellant's house.

3. Kemunto confirmed to the Court that she was called by Omenya on 22nd August, 2014 at around 3 a.m. who told her that her nephew had been assaulted. It was still dark when she arrived at the scene and she used a flashlight to see the deceased. As they went to report the matter to the police she heard people at the scene saying that Mustafa (the appellant) had killed the deceased. She saw a large stone and a knife at the scene which were stained with blood. Some people apprehended the appellant and brought him to the scene where he was arrested. The appellant was beaten by the crowd and rescued by the police.

Jeremiah Ombati (PW3 - Ombati) told the Court that on 22nd August, 2014 from 3 a.m., he was woken up by the sounds of conflict, near his house which is by the road. He came out of his house and was around 10meteres from the scene when he saw someone being beaten on allegation of being a thief. Ombati did not know the victim of the assault but knew the aggressor as the appellant, who lived nearby. The appellant was saying that the deceased had organized for thieves to steal from him, which the deceased was denying. No one intervened. Early the next morning Ombati awoke to the sound of a woman screaming and learned that the deceased had died at the scene. The appellant was brought to the scene at around 9 a.m. while being beaten by the crowd and he was saved by the police. Ombati told the Court that he saw a knife, a stone and a whip at the scene. He said there were very high security lights at the scene which illuminated it to enable him see and witness what was happening.

4. Felix Murori (PW6-Murori) was asleep on the early morning of 22nd August, 2014 when he was woken by noise of someone calling for help. He went out to investigate and found the appellant, known locally as Mustafa, beating the deceased with a rungu while claiming that the deceased had sent people to steal from him. The appellant also had a knife and was threatening the gathered crowd therefore they did not go nearer to help. He later learned that the deceased had died. He said that he knew the deceased and the appellant as his friends, and that he had known the appellant for 4 years. He testified that there were security lights and the area was well lit.

Festus Okemua (PW7-Okemua) stated that he received a telephone call on 22nd August, 2014 from a friend named Evans, telling him to call relatives of the deceased to inform them that the deceased had been assaulted by Mustafa. He managed to send a message to Kemunto and they met at the scene, around 100 meters away, at around 4 a.m. They found the deceased on the ground and he appeared to be dead. There was a stone at the scene.

5. Dr. Dorothy Njeru (PW4), a pathologist with the Ministry of Health examined the body of the deceased on 29th August, 2014. She observed that the deceased had abrasions on the left side of the head and fractures in the skull, with bleeding in the brain. The cause of death was identified as head injury due to blunt force trauma with a stab wound in the jaw. She also noted defensive injuries on the arms.

   Lawrence Muthuri (PW5), a government analyst, received a blood stained knife from the police where upon analysis, he confirmed that the knife given to him bore the blood of the deceased.

   PC Moses Muragari (PW8) then attached to Makadara scenes of crime, photographed the scene. He confirmed that the appellant was brought to the scene when police had already arrived and there were other members of the public there. He produced various photographs of the scene as part of the evidence.

6. PC Eliud Owindo (PW9) was the investigating officer who took over investigations from a previous officer. He carried out investigations and later charged the appellant with the offence.

   Dr. Kizzy Shako (PW10) from the Police Surgery, examined the appellant on 4th September, 2014 and noted that he had stitches and bruises that were healing but he was mentally fit to stand trial.

   The trial court found, upon evaluating the prosecution case that there was a prima facie case for the appellant to answer. In a sworn statement the appellant told the Court that on 21st August 2014 he went to his shop as usual. On the evening of 22nd August 2014 he opened his pub and the pub was robbed at around 1.30am. The robbery was committed by a group of men who ordered everybody to lie down and they stole alcohol, a DVD and mobile phones. The victims were locked in the pub but a neighbor opened the door for them. He said that the deceased had been captured as one of the robbers and was beaten outside the pub by watchmen and he went to report the matter at the police station at around 3.30 a.m. He was to report to work at around 7 a.m. but he was arrested on allegations of attacking the deceased and he was injured by some people and was rescued by police. He denied that he and the deceased were friends or that he beat the deceased at all. He said that there was light inside the pub but not outside the pub.

7. As earlier stated, the High Court found the prosecution case to have been proved beyond reasonable doubt and the appellant was convicted of the offence and he was sentenced to death.

   The appellant has filed Supplementary Memorandum of Appeal from the decision of the High Court, which is accompanied by written submissions all drawn by his lawyers M/S Gathoni Mugo & Company Advocates. The appellant contends that the High Court erred in law and fact by finding that he was positively identified; that the High Court erred in law and fact by convicting him on circumstantial evidence; that the High Court erred in law and fact by finding that the prosecution had proved its case beyond reasonable doubt; that the High Court erred in law and fact in not considering his defence and, finally, that the High Court erred in law and fact by sentencing him to the maximum death penalty even after mitigation.

8. It is submitted (in written submissions) that the trial court erred in finding that the appellant was at the scene on the material night when, according to the appellant, the witnesses had not identified who killed the deceased; that there was no sufficient light to enable witnesses to see clearly what was

happening at the scene. The case of *Nzaro v Republic* (1991) KAR 212 amongst others is cited in support of the proposition that evidence of identification by recognition at night must be absolutely watertight to justify conviction.

It is submitted for the appellant that it was wrong for the trial court to convict the appellant on the basis of circumstantial evidence when there was no overwhelming evidence from prosecution witnesses that placed the appellant at the scene. The case of *Kipkering Arap Koskei v Republic* (1949) 16 EACA 135 amongst other cases is cited on what constitutes circumstantial evidence and factors to consider for a court to convict on the basis of such evidence.

9. The appellant cites section 107 of the *Evidence Act* on the burden of proof and relies on the case of *Gordon Omondi Ochieng v Republic* (2021) eKLR for the proposition that to find conviction in a criminal case the trial Court has to be satisfied of the accused person's guilt beyond reasonable doubt.

It is submitted that the appellant's defence was not considered and the High Court is faulted for imposing the mandatory death sentence in the face of the Supreme Court of Kenya decision on that issue in *Francis Kariokor Muruatetu & Another v Republic* (2017) eKLR. We are asked to allow the appeal by quashing the conviction and setting aside the sentence.

The Office of the Director of Public Prosecutions filed written submissions where it reminded us of our duty on a first appeal. That office discusses what constitutes murder and what must be proved and it is submitted that all ingredients of that offence were proved to the required standard. We are asked to dismiss this appeal.

10. All the grounds of appeal raised in the Supplementary Memorandum of Appeal raise issues of law and fact which it is our duty to evaluate and reach our own conclusions.

We have considered the record of appeal, the submissions by the parties and the law.

As provided under Section 206 of the *Penal Code*, the elements to prove the offence of murder are proof of occurrence of death, proof of mens rea and proof of actus rea. We will now consider whether the evidence by the prosecution indeed met the threshold to support the judgment handed down by the Court.

Firstly, the fact of the deceased's death is undisputed as proved by the evidence of prosecution witnesses who were at the scene and the evidence of the doctor who performed post mortem on the body of the deceased. Regarding mens rea and actus rea, we are of the view that these two factors are evident in the testimony given by Ombati and Murori who gave direct evidence as eye witnesses to the assault of the deceased by the appellant. They saw the appellant who had armed himself with a knife, a stone and whip which they saw him use repeatedly to assault the deceased who lay defenseless on the ground. They told the Court that they knew the appellant prior to the incident and managed to identify him with the available security lights at the scene. They also stated that they heard the appellant, in the course of the assault, accuse the deceased of bringing people to rob his bar. The appellant in his defence denied beating the deceased and denied that they were friends. These witnesses gave direct evidence of what they witnessed and there was the additional evidence of the pathologist who testified on the serious injuries suffered by the deceased which led to his death. This is how the trial Judge concluded on this issue of the death of the deceased and whether it was unlawful:

> ... contusions on both hands; fractured skull; fractured mandible and maxilla; stab wound on left side of the jaw and extensive bleeding in the skin covering the head and in the substance of the brain. By the very nature of these injuries it is clear to me that the death of the deceased was unlawful."

11. The evidence given by prosecution witnesses showed that the appellant viciously attacked the deceased and inflicted such injuries that led to his death. The injuries were to the head and surrounding areas and the appellant must have intended to kill the deceased or to cause him grievous harm thus satisfying what constitutes malice aforethought under section 206 of the *Penal Code*. That evidence was direct, not circumstantial, and we are satisfied like the trial court that it was proved to the required standard that the appellant killed the deceased with malice aforethought.

    On sentence, the High Court sentenced the appellant to death in the ruling on sentence dated 7th November, 2018. The High Court considered mitigation offered but found that the injuries inflicted by the appellant on the deceased were very painful; that the appellant took the law into his hands and that:

    > justice will be served if the accused is to suffer a sentence that is commensurate with the suffering the deceased underwent, again bearing in mind that life of a human being is priceless ..."

12. The appellant cites various cases including *Francis Kariokor Muruatetu* (*supra*); Criminal Appeal No. 119 of 2016 Fredrick Juma Agunga & 2 others which cases discuss the issue of mandatory nature of the death sentence as provided in the Penal Code.

    The position before the pronouncements by the Supreme Court of Kenya in *Francis Kariokor Muruatetu* (*supra* - also known as Muruatetu 1) and F*rancis Kariokor Muruatetu and Another v Republic* (2021) eKLR (also known as Muruatetu 2) was that a trial court was legally bound to impose a death sentence upon entering a conviction on an offence of murder. The Supreme Court having answered the question whether it was constitutional for Parliament to prescribe that as the minimum sentence that the death sentence be imposed in the negative -holding that it was unconstitutional for Parliament to do that - the Court should now consider the circumstances of each case and impose an appropriate sentence that would meet the ends of justice for both the appellant and the deceased or the family of the deceased.

13. There was no doubt that the appellant attacked the deceased in a way that left no doubt that he intended to kill him. There was evidence by prosecution witnesses including Ombati, Murori and others who went to the scene that the appellant was accusing the deceased of having organized a raid on his pub which had led to robbers entering the pub and robbing the premises and patrons who were present. There was evidence that the appellant operated a pub in the area. He was annoyed that operations at his pub had been affected by a raid by robbers and he suspected that the deceased, who resided in the same area had organized the same. It is not lost on us that a life was lost but taking all factors into consideration we are of the respectful opinion that a custodial sentence will serve the ends of justice in the case.

    The final findings that we make are that the appeal on conviction fails and is dismissed. We allow the appeal on sentence by setting aside the death sentence imposed. The appellant will serve a custodial sentence of thirty (30) years imprisonment from 10th September, 2014 when he was first presented to the High Court of Kenya at Nairobi.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

ASIKE-MAKHANDIA

..... JUDGE OF APPEAL

A.K. MURGOR

.....**

JUDGE OF APPEAL**

S. ole KANTAI

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JUDGE OF APPEAL**

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

Signed

DEPUTY REGISTRAR