



**AL v Republic (Criminal Appeal 55 'A' of 2017)  
[2024] KECA 462 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KECA 462 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 55 'A' OF 2017  
PO KIAGE, FA OCHIENG & WK KORIR, JJA  
APRIL 12, 2024**

**BETWEEN**

**AL ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Bomet  
(Muya, J.) dated 3rd December, 2018 in HCCRC No. 23 of 2016)*

**JUDGMENT**

1. The village of Kiowa, in Koinoin Sub-County of Bomet County boasts of a bar named Sweet Waters. To this drinking joint repaired a woman, a stranger to the village, on the evening of 9<sup>th</sup> September 2016. Her presence there was to have fateful, nay, fatal consequences, that provide the backdrop to this appeal, for two young men, known to be friends and co-workers, later that night got into a quarrel over that strange, nameless woman that left one of them dead, and the other now labouring under a sentence of death.
2. An Information filed by the Director of Public Prosecutions of behalf of the Republic at the High Court at Bomet informed the court that AL (the appellant) murdered Dominic Kitur (the deceased) on that date, at the aforesaid village. The appellant denied the charge and a trial ensued in which the prosecution called a dozen witnesses in proof of the charge.
3. The case they presented, in a nutshell, from our own consideration of the record, is that PW1, Japheth Ngetich was at the Sweet Waters Bar (the bar) from 8.00 to about 9.00pm drinking in the company of the deceased, the appellant and one Bethawel Kirui. While they drank, the deceased and the appellant



disagreed over some woman who, though not with them, had nevertheless caught their fancy. He said this in cross-examination;

“ There was a lady who was a stranger in the town. We were not seated with her. She was with other people. Dominic and Aaron disagreed over the lady. Dominic and Aaron had severally canvassed with the lady on intervals outside the bar. Dominic did not tell me anything about the lady. The lady was staying at a homestead in the neighbourhood.”

4. The stranger woman appears to have left the bar earlier but as PW1 escorted the deceased to Konoin Institute where he was a carpenter, they met the appellant who said he was waiting for the deceased as he started stalking the duo. PW1 asked the appellant to go to sleep but the latter would hear none of it. He instead hastened and overtook them before confronting PW1 and hitting him on the left shoulder, sending him sprawling to the ground. The appellant continued following the deceased and, as PW1 stood up and followed them, he saw what appeared to be the appellant punching the deceased before the appellant run off. PW1 rushed to where the deceased had fallen and that is when he saw him bleeding from the chest. He was saying that he had been hit.
5. As he was unable to raise or carry the deceased, PW1 ran to the Institute about 70 to 100 metres away, to seek help. There, he found the watchman, the foreman called Rono and Nge'no, a planner, and he told them what had transpired. Together, they went to where the deceased lay and found him dead. Members of the public came, as did the local chief who called the police from Mogogosiek. They came and took the body away.
6. A search for the appellant ensued and he was found hiding in a napier grass field. He was arrested and handed over to the police. He revealed that the murder weapon, a blood-stained knife, was in his kitchen, whence it was collected by Bernard Langat (PW6) and others, who handed it over to the area chief. PW1 was emphatic that he knew both the deceased and the appellant well as the two were working together and were on good terms till the disagreement over the lady. There was moonlight on the material night and he saw the assault on the deceased clearly, as it was a bare 10 metres away. He himself was treated of the injuries inflicted by the deceased which left his hand paralysed.
7. Charles Kibet Cheruiyot (PW2) is a farmer and was a watchman at Koiwa Secondary School. He learnt from Edward Langat, a watchman at the nearby institute that someone had been murdered and left beside the road. He went to the scene and found members of the public milling around the body of the deceased. 200 metres away he met the appellant in the company of his brother Benard who said that the appellant was responsible for the death. A little while later, the appellant slithered and faded away into a blue gum forest. A search for him ensued and, after his brother Benard called out to him, he emerged from his hiding place and was arrested. Questioned, he revealed that the murder weapon, a knife, was at his house. PW2 went with the said Benard and Joseph and retrieved it from the appellant's kitchen. It was a blood-stained, rubber handled, foot-long carved knife. PW1 knew both the deceased and the appellant.
8. Kipyegon Rotich (PW3) is a brother of PW1 and was also at the bar that fateful night. He was seated with the appellant and they were drinking between 7.00pm and 9.00pm. At one point the deceased came and told him that the appellant had insulted him. He used to work with them both. The appellant used to work under the deceased and their relationship was cordial. As he left for home at about 10pm, he learnt from a watchman that the deceased had been stabbed to death by the appellant. He saw the body lying on the roadside with visible injuries.
9. Administration Police Constable David Mudachi (PW4) of the Koiwa AP post received a call from his area chief Wilson Langat at 0. hrs instructing him to proceed to Koiwa Centre. He found the deceased



- lying on the ground with injuries to the right side of the chest. The appellant was said to be the suspect and hiding. His brother Benard Langat showed the police and members of the public where he was hiding in the farm and he was apprehended and was taken to Mogogosiek Police Station.
10. Sammy Kipkemoi Ngeno, (PW5) was working at the Konoin Construction Site. He was asleep on the 9<sup>th</sup> September 2016 between 9.30pm and 10.45pm in the company of Stephen Rono when the appellant walked in holding a knife in his hands. He said he had stabbed someone and was requesting them to go take the person to hospital. With him leading, they proceeded thence and found the deceased lying beside the road with injuries on the left ribs. He was unconscious. They called the local chief who came with Administration Police Officers who were later joined by regular police at about midnight. By then the appellant had disappeared but after a search he was found hiding in bushes and seemingly in shock. PW5 stated that he knew both the deceased and the appellant who worked together at the construction site and appeared to have a good relationship.
  11. Benard Langat (PW6) is the appellant's brother. He was at home that fateful night when at about 11.00pm the appellant came and woke him up reporting that he had fought with and stabbed somebody with a knife. He still had the knife which was blood- stained. The appellant asked him to go and check on the deceased at the Koiwa Polytechnic. He went with the appellant who, however, hid at a nearby bush as there was a crowd of people at the scene. PW6 found the deceased already dead. He was bleeding from wounds on the ribs. PW6 pointed the police to where the appellant was hiding and he was arrested. The deceased and the appellant were close and used to visit PW6's home and get vegetables and also used to go drinking together.
  12. The foregoing account was confirmed by Wilson Langat (PW7) the area chief as well as PW11, Stephen Kipkurui Rono, a foreman at Konoin Technical Construction Site. He was with the security officers when the appellant came to them with a blood-stained knife and requested that they go take the deceased, whom he had stabbed, to hospital. The two were friends and workmates who related amicably.
  13. Dr. Mutai Wilson (PW9) was the Medical Officer of Health at Konoin Sub-County Hospital. On 12<sup>th</sup> September 2016 he conducted post-mortem examination of the deceased at Kapkatet Hospital. He observed two distinct stab wounds on the face measuring 4cm each and one stab wound on the lateral side of the chest caused by a sharp object. It penetrated to the spleen and there was a huge amount of blood in the abdominal cavity. He determined the cause of death to be hypovolemic shock due to internal bleeding, and produced the post-mortem report.
  14. The case was investigated by PC Tirus Gitonga (PW12) attached to DCI Konoin. On 10<sup>th</sup> September 2016, just past midnight, he was called by the police and requested to accompany the OCS to a scene of crime. Proceeding to Konoin Primary School they found the body of a young man with wounds on the face and chest. Present were the local chief and members of the public. The appellant had been arrested as the suspect. A post mortem was performed and he recovered the vest the deceased had been wearing. He took blood sample from the appellant and the deceased before sending those items for forensic analysis. He recorded statements and later charged the appellant with the murder.
  15. The forensic examination was conducted by Dalmas Kibet Sang, (PW8) a government analyst based at the Government Chemist at Kisumu. After receiving 4 items for analysis he found that the knife and the white vest generated DNA profiles indicating they were stained with the deceased's blood.
  16. At the end of the prosecution case the appellant was placed on his defence and he elected to make an unsworn statement in which he stated that he was at the bar with the deceased and others taking drinks between 7.00pm and 9.00pm. The deceased then asked him to accompany him to take a knife they had been tasked to make to the person who gave the work. When he said it was late, the deceased slapped



- him and other revellers told them to leave. He left but the deceased followed him and stabbed him with a knife. The appellant pushed him and he fell down saying he had been injured. The appellant went and reported to his brother who went to check on the deceased. In short, he denied the offence.
17. Muya, J. who heard the case found the prosecution case proved and convicted the appellant. After taking the mitigation offered on behalf of the appellant, the learned judge sentenced him “to suffer death as per law provided.”
  18. The appellant was aggrieved and filed this appeal against both conviction and sentence. In a memorandum of appeal filed on his behalf by learned counsel Hosbon Matoke Nyagaka, he complains that the learned judge erred by; ignoring the cardinal principle that the prosecution bears the burden to prove each ingredient of the charge beyond reasonable doubt and deciding the case against the weight of evidence failing to note that the prosecution failed to prove the age of the appellant and proceeding to sentence him as an adult failing to consider the appellant’s unsworn evidence erroneously holding that the appellant stabbed the deceased contrary to evidence failing to give due regard to the contradictions and inconsistencies in the prosecution case, leading to a miscarriage of evidence imposing the death penalty which violated the appellant’s right to life and was unconstitutional.
  19. Counsel filed written submissions which he highlighted at the virtual hearing of the appeal. Citing the old case of *Woolmington Vs. DPP [1935] UKHL1*, Mr. Matoke urged that the prosecution did not prove that the deceased was stabbed by the appellant. He next argued that the appellant was at the time of the trial only 17 years old, which he pointed to the court at the very beginning, but this was not given due consideration. He ought to have been tried as a minor yet the learned judge treated him as if he were an adult. He also should not have been sentenced to suffer death. Instead, he should have been sent to a borstal institution. Counsel therefore pleaded that the appellant, who had already spent 8 years in custody, be set free.
  20. The Republic opposed the appeal through Mr. Omutelema, the learned Senior Assistant Director of Prosecutions. He first conceded, very properly in our view, that the issue of the appellant’s age was significant and was left unresolved. He should not have been sentenced to death. However, it was learned counsel’s view that whereas in some instances such violations could easily vitiate the trial given the nature of the case, the interests of justice herein demanded that the appellant be held to account for the murder since there was overwhelming evidence that it is he that inflicted the fatal injuries before going to report. He urged us to maintain the conviction.
  21. On sentence, Mr. Omutelema expressed the view that it was not lawful given the appellant’s age and the mitigation factors of his having been drinking and also made the first report on the stabbing. He urged us to set aside the death sentence and impose a term sentence of 10 years.
  22. We have carefully re-evaluated the entire record in a fresh and exhaustive manner which is our duty in a first appeal (*okeno Vs. Republic [1972] EA 32*). Having done so, it seems to us established beyond any reasonable doubt that the appellant did fatally stab the deceased on the night. PW1 was an eye witness to the stabbing. Even though he thought that the appellant, who had menacingly lain in wait then later stalked the deceased and him, had merely punched the deceased, the injuries inflicted from the blow or blows were clearly with a sharp weapon leaving the deceased sprawled on the ground bleeding from the chest and stating that he had been hit. There was absolutely no doubt as to the identity of the assailant as the appellant had been with them at the bar, had waited for and spoken to them stating he was waiting for the deceased and had followed them. There was moonlight and he was close enough to dispel any doubt that it is he that hit, in fact stabbed, the deceased.
  23. But that is not all. The appellant himself told multiple witnesses a few minutes later that he had stabbed the deceased and asked them to go fetch him and take him to hospital. These included the foremen at



the construction site Sammy Ngeno (PW5) and Edward Langat (PW10) as well as his own brother Benard Langat (PW6). As he spoke to these witnesses, he was carrying the still-bloody knife that he had used to stab the deceased. And he also revealed to PW6 and two watchmen Charles Cheruiyot (PW2) and Joseph Rotich that the knife was at his house whereupon the trio proceeded thence and retrieved it. The blood stains on the knife as well as the vest that the deceased had on were confirmed to match the DNA profile of his blood. And the stab wounds on his body were also established to be the cause of his death.

24. In those circumstances, we are satisfied that the appellant is the person who violently assaulted the deceased by use of a deadly weapon. His action was an unlawful act that caused the death of the appellant. He was at the time impelled by malice aforethought as defined by section 206 of the Penal Code in that he had the intention to cause the death of or do grievous harm to the deceased. He knew that plunging a sharp knife into the chest of the deceased would cause his death or grievously harm him. In the event, the deceased died as a result of that act.
25. From the evidence, therefore, the offence of murder was firmly proved by solid, cogent and consistent evidence and the appellant's conviction was, on a proper analysis of that evidence, quite inevitable and we would not disturb it. We do not accept Mr. Matoke's contention that all there was herein was suspicion which could never suffice as was stated in *Sawe Vs. Republic* [2003]eKLR. There was overwhelming evidence.
26. Turning now to sentence, we first observe that the Republic conceded that the sentence of death imposed by the learned judge was not lawful. This concession followed on the argument made on behalf of the appellant that his age was not proved. The appellant stated, when he was arraigned in court on 20<sup>th</sup> September 2016, that he was 17 years old having been born in 1999, and that he had a birth certificate to that effect. The learned judge ordered that he be taken for age assessment at Kapkatet Hospital. When the case was next in court for hearing on 5<sup>th</sup> October 2016, the assessment had not been done and the learned judge reiterated the order before fixing the hearing for 17<sup>th</sup> November 2016. On that occasion, a Mr. Kenduiwa was learned counsel appearing for appellant. He sought direction on the appellant's age at which point the court simply ordered: "A report will be rendered later." Unfortunately, that 'later' never came and the trial proceeded without that issue being resolved.
27. Whereas it is concerning and disconcerting that the trial court literally packed away and forgot this important aspect of the matter, we are doubtful that the failure to have it addressed satisfactorily vitiated the trial, as has been urged by counsel for the appellant. We are alive to the protection afforded a minor in conflict with the law under the *Children Act*. Considering, however, that, importantly, the appellant was represented by counsel all through, the seriousness of the charge that confronted him, and the fact that the trial straddled his being a minor and being an adult, we are minded to and do hold, that the failure to address his age did not, in the circumstances of this case, cause him such prejudice as to render the trial a nullity.
28. That said, however, we think that the age of the appellant, being in late teenage at the time of the offence, is a relevant consideration when determining the appropriate sentence. We note that the appellant raised his youthfulness as a mitigating factor alongside his remorsefulness and his being a breadwinner for a large family of ten siblings. He also blamed the alcohol he had taken and stated that the probation report was favourable. However, even though the learned judge noted the mitigation, including the fact that the appellant immediately reported the stabbing, all he stated is that he was sentencing the appellant "to suffer death as per law provided." It is not evident that the learned judge well and fully exercised his discretion as he ought to have since the Supreme Court ruled the mandatory death sentence for murder to be unconstitutional in *Francis Karioko Muruatetu & Anor Vs. Republic*



[2017]eKLR. Nor is there the weighting of all aggravating and mitigating factors in the case as expected of a sentencing court in the Sentencing Guidelines.

29. We think that whereas the offence committed by the appellant led to a senseless loss of another young life, the toxic combination of youthful exuberance competing for the attentions of the strange woman at Sweet Waters Bar, emboldened by the alcohol imbibed for the better part of the evening, played a significant part in the appellant's fatal stabbing of the deceased. The record is clear that there was no bad blood between the two, who were, in fact, close friends who worked amicably together and socialized well out of work. The appellant was in shock after the dastardly act and made no effort to escape, deny the deed or even to conceal the knife. He had it, bloody and all, in his hands as he reported the stabbing and asked his brother and other witnesses to go attend to the deceased and take him to hospital.
30. All in all, the appellant does not present as a criminal who did not care for human life, and it would hardly be in keeping with the legitimate aims of punishment to impose upon him the ultimate sentence of death, which we hereby set aside. We substitute therefor an order that the appellant is sentenced to the term already served.
31. In the result, the appeal on conviction is quashed but the one on sentence is allowed as aforesaid. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

**DATED AND DELIVERED AT NAKURU THIS 12<sup>TH</sup> DAY OF APRIL, 2024.**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

