Mumika v Republic (Criminal Appeal 57 of 2017)
[2024] KECA 1052 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KECA 1052 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 57 OF 2017

MSA MAKHANDIA, K M'INOTI & KI LAIBUTA, JJA

APRIL 12, 2024

BETWEEN

FRANCIS KINYUA MUMIKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Embu (Muchemi, J.) dated 14th March 2017 in HC)

JUDGMENT

1. The appellant, Francis Kinyua Mumika, was charged, tried, convicted and sentenced by the High Court of Kenya sitting at Embu for the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. Upon conviction, the appellant was sentenced to death.

2. The particulars of the information were that, on the night of 18th October 2013 at Karingari Trading Centre in Embu West District within Embu County, he murdered Martin Mugambi, "the deceased".

3. Dissatisfied with the conviction and sentence of the trial court, the appellant has appealed to this Court on grounds deciphered from both his homegrown and supplementary grounds of appeal to be that the trial court erred in law and fact in not appreciating that: the prosecution did not prove its case against the appellant to the required standard; malice aforethought was not established; the defence by the appellant was not considered; and, finally, the sentence imposed was manifestly harsh and excessive.

4. Before we delve into consideration of the aforesaid grounds of appeal, it is necessary that we contextualize the appeal by reverting to the evidence tendered in the trial court by the prosecution in support of its case, albeit in an abridged form.

5. On 18th October 2013 at about 10.00 p.m, PW1 Jolin Igoki Njiru, a former wife of the appellant was accompanied by the deceased as she walked back to her kiosk to pick some cigarettes she had left behind

which the deceased had requested for. While on the way, they encountered the appellant holding an object. The appellant immediately attacked the deceased by hitting him with the object. PW1 then escaped and ran to her house shouting for help, but none was forthcoming. She returned to the scene and found the deceased on the ground and the appellant sitting on him as they struggled with each other.

6. When the appellant saw PW1 again, he ran after her but was unable to catch up with her. Courtesy of the security lights from a hotel across the road, PW1 was able to recognize the appellant who had been her husband for a period of eight years before they separated and had with him a 12-year-old child. He lived in the neighbouring plot. When the appellant saw members of the public approach, he ran towards his house but was later arrested by members of the public 3 kilometres away at Kathagiri and handed over to the police. The appellant had earlier on sent a threatening message to PW1 on her cell phone that she would not marry any other man, and that if she continued with her affair with the deceased, he would do something about it.

7. A short while later, PW7, Consetta Njiru, the chief of the area, received a call from PW3, Amasha Mugendi Ndwiga and PW4, Jack Johanas Gitonga, members of the local community policing group, who informed him that they had arrested a man who looked suspicious, had blood stains on his forehead and his clothes were dusty. The Chief informed the police including PW5 C.I Hulton Lutta, the OCS, Manyatta Police Station who visited the scene in the company of PW2 PC Murimi Musavi, a scene of crime officer, who took photographs of the deceased body which had a stab wound on the chest. He later processed the photographs and tendered them in evidence. The body of the deceased was subsequently removed to Embu mortuary that very night. The appellant was re-arrested by members of the public by the police led by PW5 and taken to Manyatta Police Station. The following morning, he led PW 5 to a place near a stream where he had hidden the murder weapon, namely a knife which was recovered. PW 6, SGT Sagala, took blood samples of the appellant and the knife which he forwarded to the Government Analyst for further investigations.

8. PW9, Henry Kiptoo Sang, a Government Analyst, examined the knife and blood samples of the appellant and found no blood samples on the knife. PW8, Dr. Joseph Thuo, a psychiatrist attached to Embu County Hospital, conducted mental assessment on the appellant and returned a verdict that he was fit to plead.

9. Finally, PW10, Dr. Kevin Ombati, performed the post-mortem on the body of the deceased and concluded that the cause of death was cardiorespiratory arrest due to the bleeding in the chest from the stab wound, and that the weapon used was a knife.

10. Put on his defence, the appellant in a sworn statement advanced the defence of an alibi. He stated that, on the material day, he spent the whole day at a construction site as he was a mason; that he returned home at about 8.00pm; that he thereafter left the house for the nearby shops to buy phone credit; that, on his way back, the appellant found two men accompanied by PW1 outside the gate of the plot where he stayed; that PW1 then gave one of the men a knife and told him to do as he had told him; that the appellant was then attacked after being dragged to the road away from the plot; and that the one given the knife slipped and fell and was injured by the knife, but the appellant managed to escape though he had been injured on the left side of the stomach and shoulder. The appellant stated further that, as he went to report the incident at Manyatta police station, he was arrested by three men, who called the police and he was re-arrested and later arraigned in court for the offence he knew nothing about.

11. The appellant called his 14-year-old son as a witness. He merely confirmed and corroborated what the appellant had stated.

12. As already stated, the appellant was nonetheless convicted and sentenced, and has now appealed to this Court. Being a first appeal, we are duty bound to re-consider and re-evaluate the evidence before the trial court and reach our own conclusions, bearing in mind, however, that we did not see or hear the witnesses as they testified, and we should therefore make due allowance for that. See *Okeno vs. Republic* (1972) EA 32.

13. When the appeal came up for hearing on a virtual platform, Mr. Magua, learned counsel, appeared for the appellant whereas, Mr. Bernard Ngetich, learned prosecution counsel appeared for the respondent.

14. Urging grounds 1, 3 and 4 together, it was submitted by the appellant that the prosecution did not establish the ingredients of the offence of murder; that, though the prosecution proved the death of the deceased, it failed to prove that the death was unlawful, and that the appellant had the necessary malice aforethought during the commission of the offence; that, from the evidence, it was clear that the appellant was still emotionally attached to PW1, who had been his wife for 8 years and they had a child together; and that he was therefore provoked when he saw PW1 with the appellant in a compromising situation, which pushed the appellant to act in the heat of passion. That being the case, counsel submitted, that the appellant ought to have been charged with the lesser offence of manslaughter as opposed to murder.

15. On ground two, it was submitted that the prosecution case was hinged on circumstantial evidence as there was no evidence directly linking the appellant to the crime. Counsel reverted to the appellant's defence and submitted that it was not contested that the appellant had been attacked by two men; that, in the melee, the deceased was injured by the knife he had been given by PW 1 to harm the appellant; and that, further, the murder weapon that could have linked the appellant to the murder had no blood thereon. Taking all the foregoing into consideration, it was submitted that the circumstantial evidence relied on to found the conviction did not meet the threshold. The case of *Erick Odhiambo vs. Republic* (2015) eKLR was called in aid for this submission.

16. On sentence, it was submitted that the sentence imposed on the appellant was manifestly harsh and excessive. Relying on the case of *Francis Karioko Muruatetu & Another vs. Republic* (2017) eKLR, (Muruatetu case), it was submitted that the trial court ought to have imposed any other sentence other than death since the mandatory nature of the death sentence had been outlawed by the Supreme Court. In imposing the sentence, the trial court felt that it was the only sentence available for that offence. Counsel further submitted that, in the event that we agreed with him with regard to sentence, we should remit the case back to the trial court for re- sentencing.

17. Ultimately, the appellant prayed that the appeal be allowed in its entirety.

18. In response, Mr. Ngetich submitted that the ingredients of the offence were proved as required. This being: the death of the deceased; that the death was unlawfully caused and was caused by the appellant; and that, in causing the death, the appellant was actuated by malice aforethought. Counsel submitted that death was proved by the evidence of PW10 who conducted the post-mortem on the body of the deceased and also tendered in evidence the post- mortem report. As to whether it was the appellant who committed the offence, counsel submitted that PW1 witnessed the appellant commit the offence. The appellant was a person well known to her as he had been her husband for close to 8 years and had a child together. That the scene of crime was well-lit with security lights from a nearby hotel. Accordingly, this was a case of recognition as opposed to identification of a stranger and in the premises, the recognition of the appellant cannot be faulted.

19. On malice aforethought, counsel submitted that the appellant armed himself with a knife which he used to assault the deceased by stabbing him on the chest, a vital part of the body. It could only be

deduced that the appellant intended to inflict injuries or grievous harm on the deceased, which he did, leading to his death.

20. Turning to the appellant's defence, counsel submitted that the trial court took into account the appellant's defence. However, on evaluating it, and particularly where he stated that he was seized outside his gate and dragged towards the shops where he was attacked, the trial court did not believe it.

21. On sentence, it was submitted that it is trite law by now that the mandatory nature of the death sentence was unconstitutional and was outlawed by the Muruatetu case. However, given the gruesome, premeditated and appalling manner in which the murder was committed, the sentence of death imposed was well deserved, according to counsel. Lastly, counsel submitted that if the appellant wished to have re-sentencing hearing, he must first withdraw the appeal and seek re-sentencing hearing in the trial court as per the Supreme Court guidelines. Otherwise, counsel urged that we dismiss the appeal in its entirety.

22. We have considered the record of appeal, the respective rival submissions, the authorities cited and the law. In our view, the issues that fall for our determination are whether: the offence was proved as required; the defence was considered; and, finally, whether the sentence imposed on the appellant was manifestly harsh and excessive.

23. Section 203 of the *Penal Code* provides that any person who with malice aforethought causes the death of another by unlawful act or omission is guilty of murder. In essence, therefore, the prosecution must prove beyond reasonable doubt the following elements in order to secure a conviction as per the case of *Republic vs. Mohamed Koran* [2014] eKLR. These are the death of the deceased and its cause; that the death was unlawfully caused; that it was caused by the accused; and that, in causing the death, the accused was actuated by malice aforethought.

24. On the evidence on record, there can be no doubt that the death of the deceased and its cause were proved by the evidence of, PW1, PW2, PW5, PW6 and PW10. Save for PW10, these witnesses saw the deceased body at the scene of crime. However, the evidence of PW10 is critical. He is the one who conducted the post-mortem. In his report, he detailed the injuries that the deceased had suffered and concluded that the cause of death was cardio-respiratory arrest due to the bleeding in the chest from a stab wound, and added that the probable type of weapon used was a knife. Finally, in his written submissions, the appellant concedes that, indeed, the prosecution proved the death of the deceased to the required standard, save that he was not involved in the act.

25. Regarding the appellant's involvement in the unlawful act, PW1 testified that she knew the appellant very well as they had been previously married for 8 years; that, as she was walking with the deceased towards Karingari market, she saw someone jump from the bush and attack the deceased; and that, on closer look, she noticed that it was the appellant. She stated that the scene was well-lit with security lights from a hotel nearby, and that the light clearly helped her identify and recognize the appellant. She further stated that she saw the appellant holding an object and immediately attacked the deceased with the said object. She went to seek help and, on returning, she found the appellant sitting on top of the deceased. When the appellant saw her, he ran away. Being a person, she knew very well, having been spouses for 8 years and given she was in close proximity with him as he committed the offence, she could not have mistaken him for someone else. This was therefore evidence of recognition as opposed to identification of a stranger in difficult circumstances.

26. It has been said time without number that evidence of recognition is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon the personal knowledge of the assailant in some way. See Anjononi vs. Republic [1980] eKLR. Of course, reception of such evidence if it is from a single witness as herein must still be subjected to the usual caution that it must

be received with circumspection knowing that recognition can also be mistaken. See *Wamunga vs. Republic* [1989] eKLR. However, just like the trial court, we entertain no doubts that the appellant was properly recognized by PW1 at the scene of crime, and that the trial court properly cautioned itself of the danger of relying on the evidence of recognition by a single witness. It is obvious then and contrary to the submissions of the appellant that the prosecution case was not hinged on circumstantial evidence. There was direct evidence of recognition of the appellant in the commission of the offence.

27. Further, PW2 and PW3 arrested the appellant at around 11:00 pm, which was about one hour after the incident on the basis that he looked suspicious and was carrying a bag containing dusty clothes, had fresh cuts on the face and was bleeding.

28. PW5 also testified that the appellant led him together with Cpl. Kemoi to a stream called Mirundi near Karingari market in a bush and showed them where he had hidden the murder weapon (knife), which they recovered. This evidence further reinforces the prosecution case. How could he have known where the knife was hidden unless he did so himself? PW5 added that the knife had been cleaned and they took it to the Government Chemist. The pathologist confirmed the cause of death as cardiorespiratory arrest due to the bleeding in the chest from a stab wound by a knife. The evidence on record, therefore, places the appellant at the scene of crime.

29. On malice aforethought, section 203 of the *Penal Code* provides that any person who of malice aforethought causes the death of another by an unlawful act or omission is guilty of murder. In essence, therefore, the prosecution must prove that the person who caused the death of the deceased had malice aforethought. Malice aforethought is defined in section 206 of the *Penal Code* as follows:

> "(a) An intention to cause death of or to do grievous harm to any person whether that person is the person actually killed or not;
>
> b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> c. An intention to commit a felony.
>
> d. An intention by the act or omission to facilitate flight or escape from custody of any person who has committed or attempted to commit a felony."

30. It is worth noting that, the prosecution is not obliged to prove all of the above elements. Even one will suffice. In the case of *Republic vs. Daniel Omoyo* [2015] eKLR, this Court held that:

> "It is to be noted that once the prosecution proves one or a combination of the above circumstances, malice aforethought, will be deemed to have been established and in such a situation, there would be no escape route for the accused person."

31. PW1 testified that the appellant was not provoked when he attacked the deceased. There was no evidence of any exchange of harsh words between the two before the act. To compound the appellant's malice aforethought, he had earlier sent PW1 on her cell phone a threatening message that he would do something if she continued with her affair with the deceased. Perusal of the post-mortem report shows the nature of the injury the deceased suffered, which was a stab wound on the chest. The injury was grave and the appellant must have known that by inflicting the said injury on such a vital part of the body, he would cause grievous harm or end the life of the deceased. The gravity of the injury is

evidence of malice aforethought as provided under section 206(a) of the Penal Code and as correctly held by the trial court.

32. The appellant appears to be indirectly admitting the commission of the offence when he belatedly advances the defence of provocation; and that he was still emotionally attached to PW1, who had been his wife for 8 years, and with whom they had a child together. He was therefore provoked when he saw PW1 with the deceased in a compromising situation, which led the appellant to act in the heat of passion. In the premises, he felt that he ought to have been charged with the offence of manslaughter as opposed to murder. We must reject this submission outright as it was not raised in the trial court for consideration. It is being raised in this court for the first time, and we cannot therefore entertain it. Even if we were to entertain it, there is absolutely no evidence of provocation by the deceased. If anything, the appellant merely sprung on the deceased unprovoked and stabbed him with a knife. He could not have been acting on the spur of the moment, as he took his time, armed himself with a knife and patiently lay in wait for the deceased.

33. The trial court carefully considered the appellant's defence contrary to the appellant's submissions. On analyzing the defence, particularly where the appellant stated that he was seized outside his gate and dragged towards the shops where he was attacked, the trial court did not believe it. Neither did the appellant convince the Court that the deceased was the one who confronted him armed with a knife. No doubt, the defence of the appellant was a hopeless denial and could not poke holes in the overwhelming evidence tendered by the prosecution. In the end, we are persuaded that the appellant was properly convicted.

34. Sentencing is a crucial aspect of the criminal justice system and is discretionary. It is trite that in every trial, once an accused person has been found guilty and convicted, the court must proceed to pass sentence on him. In the circumstances of this case, the appellant was sentenced to death. This was the only lawful and mandatory sentence then available for that offence.

35. It is trite law by now that the mandatory nature of the death sentence was rendered unconstitutional following the Muruatetu case (supra). By the same decision, the Supreme Court did not however outlaw the death sentence and, therefore, it can be imposed in appropriate cases.

36. The ratio decidendi in the decision was summarized as follows:

> " 69. Consequently, we find that section 204 of the *penal code* is inconsistent with the *Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder, for avoidance of doubt this decision does not outlaw death penalty, which is still applicable as a discretionary maximum punishment"

37. Though the death penalty is still constitutional as a discretionary maximum sentence, we are satisfied that, given the circumstances of the case where the appellant had previously been in a relationship with PW1, the sentence imposed was harsh and excessive. Mitigation by the appellant is on record, which we have considered, hence there is no need to remit the case back to the trial court for re-sentencing as requested by counsel for the respondent.

38. In light of the foregoing, we uphold the conviction of the appellant with the consequence that we dismiss the appeal on conviction. However, we are persuaded to allow the appeal on sentence to the extent that the appellant will now serve thirty (30) years imprisonment from the date of conviction and sentence instead of the sentence of death imposed.

39. Before we pen off, we wish to unreservedly apologize to the parties to this appeal for the time that has been taken to deliver this judgment. The delay was occasioned by circumstances beyond the Court's control.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL, 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR