Kamau v Republic (Criminal Appeal 90 of 2020)
[2024] KECA 1022 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 1022 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 90 OF 2020

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

MAY 24, 2024

BETWEEN

ERASTUS MWANGI KAMAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nyeri (J. Ngaah, J.) dated 10th July, 2020 in Criminal Case No. 22 of 2010)

JUDGMENT

1. The circumstances leading to the commission of the offence, the subject of this appeal, are unfortunate and very sad indeed. Unfortunate because the deceased lost his life for no rhyme or reason in circumstances that could have been avoided, and sad because the parties involved were related in one way or another.

2. The brief facts of the case as presented by the 10 prosecution witnesses were as follow: - Erastus Mwangi Kamau, the appellant, was the deceased's brother-in-law, the deceased having married appellant's sister called Njeri. From the evidence before the trial court, the deceased had a girlfriend by the name Mercy. The parties all appear to have known one another as they were all residents of the small trading center called Kanderendu in Kigumo in Muranga County.

3. On the date in question (11th July, 2010) Karanja (the deceased), the appellant and Mercy were all at Furaha Bar where they were enjoying some alcoholic beverages. According to Mary Wanjiru Gathu the bar attendant, she was on duty at the bar on the fateful Sunday. It was her evidence that she had served the deceased and Mercy from around 10.30 am until around 3.00 pm when she said she took a lunch break and so she left them and came back to the bar after one hour.

4. It would appear that word reached the deceased's wife, Njeri, that her husband and Mercy were at Furaha Bar where they were enjoying their drinks. Njeri, and one Lena who was said to be the appellant's wife decided to go to the said bar, maybe to confirm the said information.

5. Peter Karimi Mugu PW2 who was closing his chemist in the neighbourhood of Furaha Bar said that at about 7.30 pm he spotted Njeri and Lena walking towards the bar carrying some wooden planks. He was to proceed to the same bar later. Samuel Kamau Macharia also went to the bar at 5.00 pm.

6. From the evidence, Mercy went to have her drinks upstairs leaving the appellant and the deceased down stairs. When the 2 women, Njeri and Lena, arrived they went upstairs and that is where the fight started as the 2 decided to teach Mercy a lesson. The ladies were led outside and the fight appears to have continued there. It was said that the appellant was offended because the deceased was embarrassing his (appellant's sister) by not intervening by removing Mercy from the bar or taking any other action that would have separated the two ladies.

7. In the process of the fight the appellant was hit on his eye. At some point the warrying parties went back to the bar corridor and the front door was closed. It was in this corridor that Peter Karimi, (PW2) found the deceased and the appellant. PW2 said that he saw the appellant holding a knife which he described as double edged and 12 inches long. He said that he saw the appellant push the deceased who fell into the urinal and when he got up the deceased stepped on the appellant's stomach. The witness stated that he saw the appellant stabbing the deceased with the knife and he left with his knife leaving the deceased on the floor. The deceased did not get up from the ground after the stabbing. The matter was reported to the Police Station.

8. PW4 (James Githiomi Kiburi) who was also at the bar told the court that he witnessed the initial fight between Njeri and Mercy but he intervened and stopped them. He said that as Njeri was leaving, she met her brother (the appellant) at the doorstep and that she produced a knife from her blouse and handed it over to her brother. The witness who remained inside the bar said that a few minutes later, he heard the screams outside and on peeping through the window he saw the deceased lying on the ground.

9. Isaac Maina (PW7) also stated that he went to the washroom down stairs and on his way back, he met the appellant who had his right hand behind his back. The witness said that he saw the appellant hold the deceased by his back and stab him at the back. The doctor who carried out the post mortem did not testify and the prosecution had to close its case after several attempts to summon him to court bore no fruit.

10. The appellant was subsequently arrested and charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code before the High Court at Nyeri.

11. When placed onto his defence, the appellant testified on oath. He told the court that he used to work at a butchery in Kangemi. He admitted that he knew the deceased but he denied having killed him. He admitted that he was at Furaha Bar on the material date from 11.00 am but said he left the bar later in the evening and was not at the bar when the deceased was killed.

12. After considering the evidence, we have summarized above, along with the rival submissions of both counsel for the appellant and the State, and the applicable law, the learned Judge (Ngaah, J.) found the act and cause of death proved. He also made a finding that it was the appellant who had stabbed the deceased. Ultimately, the learned Judge found the charge against the appellant proved beyond reasonable doubt and convicted. After considering the mitigation tendered by the appellant, the learned Judge imposed a sentence of 20 years imprisonment.

13. The appellant is now before this Court challenging both conviction and sentence on grounds, inter alia, that the learned Judge erred in law and facts by; failing to consider all the evidence on record and submissions by the defence; convicting the appellant while the elements of murder had not been proved; holding that, despite the absence of the evidence of the pathologist, there was sufficient evidence of the fact of the deceased's death; that some vital witnesses had not been called and that the sentence was oppressive in the circumstances. The said grounds are amplified in the submissions filed on 27th March, 2023. In his submissions, Mr. Kioni, learned counsel for the appellant has distilled three (3) issues for our determination:

    i. Whether elements for proof of the offence of murder were established;

    ii. whether the circumstantial evidence relied upon by the learned Judge to convict the appellant met the threshold for finding a conviction based on circumstantial evidence; and

    iii. whether the sentence was fair in the circumstances.

14. On his part, Mr. Naulikha, learned counsel for the State, also filed submissions dated 28th March, 2023 addressing the issues raised by the appellant's counsel. Mr. Naulikha maintained that the prosecution had proved its case through the evidence of PW 2, PW 3 and PW 4 who were all present at Furaha Bar and narrated what they had seen. He said that the appellant's evidence was considered but the same could not withstand the strong evidence adduced by the prosecution.

15. On the issue of the absence of the post mortem form, learned counsel submitted that the appellant was placed at the scene and that the cause of death was consistent with the injuries inflicted on the deceased's left back shoulder by the appellant.

16. He emphasized that the learned Judge had addressed extensively the issue of the absence of the post mortem form and concluded that the appellant had not been prejudiced. Counsel concluded by saying that the witnesses who were called to testify were sufficient and they proved the prosecution's case beyond reasonable doubt as required in law.

17. On the sentence, counsel insisted that the 20 years meted out was justifiable in the circumstances as it was proportionate to the offence. He urged the Court to dismiss the appeal in its entirety and uphold both conviction and sentence.

18. We have considered the evidence adduced before the trial court in its entirety along with the appellant's grounds of appeal and the rival submissions by both learned counsel.

19. Our mandate on first appeal is not just to rehash the evidence adduced before the trial court, but to subject the same to a fresh analysis and re-evaluation. We must then synthesize it, apply the relevant law and come up with our own independent conclusion.

20. In doing so, however, we must bear in mind that we never saw the witnesses as they testified and we were not, therefore, able to assess their demeanor. See Okeno vs. Republic [1972] EA 32) where this Court held:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. R. [1957] E.A. 336) 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] E.A. 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] E.A. 424."

21. Having done so, we identify the issues falling for our determination as follows:

    i. whether the elements of the offence of murder were proved;

    ii. whether the absence of the post mortem form was fatal to the prosecution case;

    iii. whether failure to call other witnesses was fatal as claimed by the appellant;

    iv. whether what the appellant calls "circumstantial evidence" met the threshold to support a conviction; and

    v. finally, whether it was the appellant who was responsible for the appellant's death.

    Finally, was the sentence imposed by the trial court harsh or excessive in the circumstances of the case?

22. On the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the appellant committed the unlawful act which caused the death of the deceased and (c) that the appellant had the malice aforethought. See this Court's decision in Anthony Ndegwa Ngari vs Republic [2014] eKLR.

23. On the actus reus, from the totality of the evidence adduced before the trial court, it was the appellant who inflicted the fatal wound to the deceased. PW2 told the court that he saw Njeri remove the knife from her blouse and hand it over to the appellant. PW4 also testified that he saw the appellant holding the knife and actually stab the deceased with it on his back. PW7 who peeped through the window after hearing screams outside said that he saw the appellant stab the deceased with the knife, and that the deceased left carrying the knife.

24. As pointed out earlier, all these witnesses knew one another before the material date. None of them was said to have had a grudge against the appellant and they had no reason whatsoever to fabricate the evidence against him. We are not persuaded that the appellant had already left the bar by the time the deceased was stabbed as he claimed in his evidence. We, like the learned trial Judge find that the deceased died from the stab wound inflicted by the appellant.

25. This brings us to the question as to whether death was proved in the absence of a post mortem report as none was produced before the trial court. The issue of proving the cause and fact of death in the absence of a post mortem form is not novel and it has been addressed by this Court on several occasions before. For instance in Republic vs Cheya & Another [1973[EA 500 and Benson Ngunyi Nundu vs R. CRA 171 of 1984; this Court stated that:

> " Proof of death is usually through medical evidence although it can also be proven from cogent and reliable circumstantial evidence."

26. Where a person dies at the scene immediately after the unlawful act which has been witnessed by eye witnesses, in the absence of any intervening circumstances, then the natural, logical conclusion is that the said act was the direct cause of death. We are not in any way underrating the importance of medical evidence in support of the cause of death. The post mortem report is evidently important to prove the cause of death, particularly where the deceased did not die immediately after the unlawful act.

27. In a case, such as this one where the deceased was stabbed in the presence of eye witnesses, and he died on the spot, and the body was removed from the scene and taken straight to the mortuary, the exceptional circumstances can be said to have been demonstrated which would allow the court to find the cause of death proved in the absence of a post mortem report being produced in court. In this case, the medical evidence would only have corroborated the direct evidence given by the eye witnesses. See also this Court's decision in Chengo Nickson Katama –vs- Republic]2015] eKLR.

28. We are, therefore, satisfied that the cause of death was the stab wound inflicted on the deceased by the appellant. Actus reus was proved beyond reasonable doubt.

29. That brings us to the element of mens rea or malice aforethought. Malice aforethought is defined under section 206 of the Penal Code as follows:-

> " (a) An intention to cause the death of another.
>
> b. An intention to cause grievous harm to another.
>
> c. Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the person killed or not, accompanied by the offence. Whether death or grievous injury occurs or not or by a wish that it may not be caused.
>
> d. An intent to commit a felony ....."

Addressing the issue of malice aforethought, the predecessor of this Court in its decision in R. -vs- Tubere s/o Ochen [1945] 12 EACA 63: pronounced itself as follows:

> " An adverse inference on malice aforethought can be made by considering the weapon used, the manner in which it was used, the part or parts of the body targeted, the manner it was used to inflict the injuries, and the conduct of the accused prior, during and after the commission of the crime."

For the offence of murder to be proved, the prosecution must prove the element of mens rea beyond reasonable doubt. This Court applying the principles set out above in Nzuki vs R [1993] KLR

171) expressed itself as follows:

> " Malice aforethought" is a term of art and is either an expression intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of Regina v Vickers, {1957} 2 QB 664 at page 670. An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of Conliffe v Goodman, {1950} 2 KB 237."

30. Did the appellant intend to kill the deceased? Maybe not. Nonetheless, from the nature of the injury, it is clear that the same was fatal. The weapon used was said to be a 12 inch double edged knife. That is without a doubt a deadly weapon. The appellant used the same with a lot of force and it only took one strike for the deceased's life to be terminated. From the nature of the weapon and the injury, it is

clear to us that if the appellant did not intend to kill the deceased, he definitely intended to cause him grievous bodily harm, or he did not care whether the deceased actually died or not. We are satisfied that the element of malice aforethought was proved to the required standard.

31. On the issue of circumstantial evidence, we find that the charge was proved through direct evidence of witnesses who saw and testified as to what happened. The standard of circumstantial evidence is not relevant to the circumstances of this case.

32. On the ground of appeal that some vital witnesses were not called to testify, it is trite that it is not the quantity of the evidence but the quality, that matters. Section 143 of the *Evidence Act* is on point in regard to this issue. It stipulates that:

> "No particular number of witnesses shall in the absence of any provisions of law to the contrary be required for purposes of proof of any fact."

In the case of Jacob Muthee & 8 Others -vs- R. Criminal Appeal Nos. 259, 255-257, 261 of 2008, this Court adopted the decision in Bukenya & Others –vs– Uganda (1972) EA 349, and stated:

> " in a criminal trial, the prosecution has a duty to call or make available all witnesses necessary to establish the truth ... and is not required to call a superfluous number of witnesses."

The number of witnesses called in this case was sufficient to prove the case beyond reasonable doubt.

33. From the above analysis, it is clear that the appeal against conviction has no merit and is hereby dismissed.

34. On the sentence, the appellant was sentenced to twenty years' imprisonment. This being a first appeal, we have discretion to interfere with the sentence, if in our view having reconsidered the evidence on record we find doing so will serve the ends of justice. We have considered the circumstances surrounding this matter. As stated earlier, the deceased was robbed of his life for no rhyme or reason. We have noted, however that the parties herein were related; there was no grudge or bad blood between the deceased and the appellant before the incident; the deceased children have suffered double tragedy after losing their father, and with the uncle who was helping to raise them being imprisoned for a long time. We find it mete and just to reduce the sentence imposed on the appellant to 15 years' imprisonment. Any time spent in remand be considered when computing the sentence.

35. The appeal against conviction is hereby dismissed. The appeal against sentence succeeds only to the above extent.

DELIVERED AND DATED AT NYERI THIS 24TH DAY OF MAY 2024

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR