



**Karia & another v Republic (Criminal Appeal 151 of 2017)
[2024] KECA 1064 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KECA 1064 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 151 OF 2017
W KARANJA, J MOHAMMED & LK KIMARU, JJA
MAY 24, 2024**

BETWEEN

PASKASIO MUCHUI KARIA 1ST APPELLANT

SHADRACK KITHURE RIMBERIA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment of the High Court at Meru (J. A. Makau, J.) dated 18th December 2014) in HCCR. No. 4 of 2011)

JUDGMENT

1. The appellants, Paskasio Muchui Karia, and Shadrack Kithure Rimberia, were arraigned before the High Court at Meru to answer the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that on 17th January, 2011 at Ngunguru Village, Kaongo sub-location Meru Central District within Meru County, the appellants murdered Silas M'Mugambi (the deceased). They both pleaded not guilty to the charge and the matter was set down for hearing.
2. The prosecution called a total of nine (9) witnesses in support of its case, which evidence we summarise as hereunder.
3. Timothy Murerwa (PW1), a son of the deceased testified that on 17th January, 2011 at 10:00am he received a call from his brother Amos Bundi (PW3) who informed him that his father had been cut at Ngunguru market at Mbijiwe's compound. Timothy and Amos Bundi (PW3) reported the matter at Kariene Police Station and thereafter accompanied some police officers to the scene. According to Timothy, at the scene they found a big crowd of people with the deceased lying on the ground at the compound with several injuries to the head and his right leg was broken. It was Timothy's testimony that they found the appellants, who were well known to him, at the scene.



4. oyce Kiende (PW2) a daughter of the deceased testified that she too received a call from her brother, Amos Bundi that their father had been killed at Mbijiwe's home. She proceeded to the scene and found the deceased lying on the ground with clothes covered with blood. She testified, further, that she saw the appellants at the scene. The two were well known to her because they attended the same school, she knew their home and their father was the late Mbijiwe. It was Joyce's testimony that the police officers conducted a search and recovered a blood-stained fork jembe and a piece of blood stained wooden fork jembe handle that was broken into 3 pieces. The items were taken by the police and the appellants boarded the police vehicle and they were taken to the police station.
5. PW4 Nason Murira testified that he received a call from Stanley Muthuri informing him about the incident and on proceeding to the scene, he found the body of the deceased with the appellants guarding the body.
6. PW5, Dr. Catherine Mwendu Mutuku, from Meru Level 5 Hospital testified that she carried out the post-mortem on the deceased's body and prepared a report dated 19th January, 2011 which was produced as an exhibit. It was the doctor's testimony that the deceased's body had multiple deep cuts on the skull frontal region, back and temporal region and based on her examination, she formed the opinion that the cause of death was the head injury and trauma.
7. Muriithi Mwenia, PW6, testified that on 16th January, 2011 he was asleep when at around 1:30am of 17th January 2011 he heard his dogs barking and upon checking, he heard the children of Mbijiwe (his neighbour) screaming. He proceeded to Mbijiwe's home but before entering the compound, the appellants told him to go back to his house and sleep. PW6 testified further that he recognized the two as there was bright moonlight and he had known them since childhood. He went on to state that at around 6:00am the 2nd appellant sent a child to call him to their home stating that there was someone who had slept at their home and was bleeding. PW6 proceeded to the appellants' home where he found them and they informed him that they had killed a wizard named Silas M'Mugambi. PW6 said that on checking the deceased, who he knew well before, he had injuries to the head and his right leg was broken. PW6 reported the matter to the elder in charge of the area named Kibori, (PW7) and also reported at Gaitu Police station.
8. On his part, Jacob Kibori, (PW7) testified that on 17th January, 2011 Damaris Machui (DW2) who is the 1st appellant's wife went to see him and stated that she had been sent by the appellants to inform him that the two had arrested a person in their compound at night. PW7 informed DW2 to tell the appellant to take the person to the meeting that was going on for the water project and that is when DW2 informed him that the person was seriously injured and his leg was fractured. PW7 proceeded to the scene where he found the appellants and someone lying at the gate with blood on his face and clothes. It was PW7's further testimony that the appellants informed him that the person had gone to their home at night to bewitch them, that the two were guarding the body while armed with pangas. PW7 knew the appellants well as they were his neighbours and knew the deceased as well.
9. Chief Inspector Mwalili Kiema (PW8), testified that on 17th January, 2011 at around 12 noon he received a phone call from the OCS of Gaitu Police Post, Corporal Lebwaku John informing him that someone had been killed at Ngunguru Village of Nduruma Location. He called a scene of crime officer, CPL Kanyi (PW9) and in the company of PW8 they went to the scene. On arrival, they found the body, which had multiple injuries, lying on the ground. According to the witness, the scene showed signs of struggle all over with blood spills on the ground. PW8 also saw blood stained pieces of thick sticks which appeared to have been used to inflict injuries to the deceased. Together with the other police officers, they carried out a search and found a fork jembe and a panga which were blood stained. The items were produced before the trial court as exhibits.



10. On conclusion of the prosecution case, the appellants were found to have a case to answer. The 1st appellant testified on oath and called DW2 Damaris Kiendi Muchui as his witness. The appellant's defence was that on the night of 16th and 17th January 2011, he was sleeping at his home with his wife DW2 and children when he heard screams from the road at around 1:45am, there was bright moonlight and when he went out to check what was happening, he saw three people and on asking them who they were, they ran into the maize plantation. He did not follow them, but went to the gate where he found someone groaning and was unable to talk. He was joined by his brother, the 2nd appellant, Shadrack Kithure who had a lit a torch which he pointed towards the person who they recognized as Kirugi, a neighbour. They tried to assist him and stayed with him till the next morning.
11. It was the appellant's testimony that he did not chase or threaten anyone during the incident and denied being armed with any weapons. He further testified that he had no grudge with the deceased and did not know why he was at their gate. That the sticks were recovered by the police at the gate and the panga was recovered from their mother's house. Further, that the police asked them to go and record statements but instead they were locked up in cells.
12. His witness, Damaris Kiendi Machui testified that she was a wife to the appellant, and on the fateful night she heard screams and asked her husband to find out what was happening. The appellant went out but DW2 did not and the appellant came back and informed her not to get out as it was bad outside but he did not give her details of what was happening. In the morning, the appellant sent her to PW7 to tell him someone had been killed within their homestead. Thereafter, she went to a meeting for the water project and came back at around 1:00pm and found the appellant in a police vehicle. Later she learnt that the appellant had been charged.
13. The 2nd appellant, Shadrack Kithure Rimberia, testified that on the fateful night, he heard screams near their home and heard his brother's (the appellant's) voice asking who those screaming outside their home at night were. His brother, the 1st appellant, then informed him that someone had been assaulted near the gate. He lit his torch and saw the deceased, who was known to him, lying on the path from their home. They sent DW2 to call PW7. He also sent his nephew, a child, to notify PW6 that someone had been killed in their compound.
14. Having considered this evidence, the trial court observed that there was no eye witness to the events that led to the death of the deceased. The prosecution case was based on circumstantial evidence which placed the appellants at the scene of crime. The prosecution witnesses knew the appellants and clearly saw them at the scene of crime. The learned Judge found that the evidence on record, though circumstantial, irrefutably led to the conclusion that the appellants were responsible for the deceased's death. The court found the evidence of PW4, PW6 and PW7 credible and very corroborative, and this, coupled with the recovery of the murder weapons in the appellants' compound left the court in no doubt that the deceased was killed by the appellants. The court also applied the principles enunciated in a litany of cases on circumstantial evidence to arrive at its conclusion.
15. On the issue of malice aforethought or, mens rea, the court found that the appellants had used crude weapons, including a fork jembe, stones and wooden planks to inflict serious injuries to the deceased, fracturing his skull and breaking his ribs and limbs. This, according to the learned Judge was proof that the appellants either intended to kill the deceased or to cause him grievous bodily harm, which were ingredients of malice aforethought as defined by section 206 of the Penal Code.

Ultimately, the appellants were found guilty as charged and convicted for the offence of murder.
16. On sentencing, the learned Judge observed that his hands were tied by the law which provided for death sentence as the only penalty for the offence of murder. He accordingly sentenced the appellants to



suffer death. We note that the conviction and sentence were before the jurisprudential shift occasioned by the case of Francis Karioko Muruatetu & others -vs- Republic [2017]eKLR.

17. Aggrieved by the conviction and sentence, the appellants filed an appeal to this Court. In the supplementary memorandum of appeal, the appellants raise 4 grounds of appeal:
18. At the hearing of the appeal, parties filed their written submissions. The appellants, through the firm of J. Nelima & Associates, filed their written submissions dated 25th July 2023. Learned counsel submitted that the circumstantial evidence relied upon by the trial Judge did not meet the threshold required by law for reasons that the evidence did not point to the appellants as the only culprits but pointed to the possibility of other persons having committed the offence. Counsel submitted further, that the testimony of the police was that when they visited the area, it appeared disturbed showing signs of a scuffle. The appellants had no blood stains on their clothes and the pangas they had, were for guarding the body, the same had no blood stains. It was submitted that the items recovered from the scene of crime were not in any way connected to the appellants. That there was no Government chemist's report showing that the blood on the items recovered matched that of the deceased. There was no consistency as to what items were recovered and where they were recovered from, noting that the prosecution witnesses PW2, PW3, PW4, PW7 and PW8 gave different versions of testimonies.
19. Counsel maintained that malice aforethought was not proved as there was no evidence connecting the appellants to the offence.
20. On her part, Ms. Nandwa, learned counsel for the State filed her written submissions dated 25th July 2023. She submitted that it was not in dispute that Silas M'Mugambi died and his body was found in the appellants' compound. The doctor testified that the cause of death was due to head injury and trauma. Ms Nandwa admitted that no one witnessed the events that led to the death of the deceased however the evidence of PW6 was direct that on the fateful night he heard his dogs barking and when he went out to check, he heard screams emanating from the appellants' home. He proceeded to the scene but the appellants told him to go back to his home. He said that he saw the appellants armed with pangas and rungus and was able to identify the appellants because of the moonlight.
21. Counsel submitted that the 1st appellant sent a child to PW6 to inform him that they had killed a wizard. PW6 saw the deceased's body in the appellants' compound. It was her submission that the circumstantial evidence relied upon by the prosecution met the legal threshold and justified the conviction of the appellants. Counsel cited this Court's decisions in Ahamad Abolfathi Mohamed and Another -vs- Republic [2018] eKLR and Musili Tulo -vs- Republic [2014] eKLR where in the latter case the Court stated:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

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. Republic [1957] E.A. 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R [1957] EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there is some evidence to support the lower court's findings and conclusion; 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 vs. Sunday Post [1958] EA 424.” See also Musili Tulo -vs- Republic (supra)



22. We have set out the evidence adduced before the trial court in substantial detail above. What we need to do now is to re-look at the evidence from a fresh perspective and determine whether the learned Judge arrived at the proper conclusion in convicting the appellants.
23. For a charge of murder to be proved, it is incumbent upon the prosecution to prove the act of unlawful killing (actus reus); and that the killing was with malice aforethought (mens rea). Those two must then be attributed to the accused person/appellant. Did the appellants kill the deceased and if so, was malice aforethought proved?
24. As observed by the trial court, there was no eye witnesses to the events that led to the death of the deceased. The prosecution relied on circumstantial evidence to prove its case. It is a truism that circumstantial evidence can prove a case with scientific precision. The standard for circumstantial evidence was laid out in the locus classicus case of *Rex -vs- Kipkering Arap Koske & 2 Others [1949] EACA135* as follows:

“In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

In *Simon Musoke -vs- R. (1958) EA 71* as follows:

“The circumstances must be such as to produce moral certainty to the exclusion for any other reasonable doubt ... It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference.”

25. We have considered the record of appeal, the grounds of appeal proffered by the appellants, the rival submissions by counsel, the authorities cited and other relevant law. The main issue for determination is whether the circumstantial evidence presented by the prosecution met the threshold set in the above precedents. The burden of proving the unbroken chain of events pointing at the appellant’s guilt reposed on the prosecution’s shoulders.
26. When PW6 heard his dogs barking on the fateful night and went to check what was happening, he heard the appellants screaming. As a good neighbour, he approached the appellants’ home to see if he could be of any help. However, on approaching the appellants’ compound, the 1st appellant asked him to go back to his house and sleep. There was moonlight, and he saw and recognized the appellants. He said that the appellants were armed with a panga and rungu. He realized that he was an unwanted intruder and decided to go back to his house.
27. Early the following morning at 6:00am, when PW6 went to the appellants’ home, after they sent for him, he found the appellants outside their compound with the body of the deceased lying there.
They informed him that they had killed a wizard. PW6 saw and recognized the deceased as Silas M’Mugambi. The only logical conclusion to be drawn from these circumstances was that the appellants had beaten up and killed the deceased the previous night when PW6 had seen them armed with a panga and a rungu and they ordered him to go back to his house and mind his own business.
28. The appellants denied being armed with panga and rungu, but both PW6 and PW7 testified that they were armed with a panga and rungu. PW8’s testimony was that the crime scene appeared disturbed



showing signs of struggle all over with blood spill. He also noticed blood stained pieces of wood and stones which appeared to have been used to inflict injuries to the deceased. On conducting further search, they found a fork jembe and a panga with blood stains, which items were produced as exhibits in court by the prosecution.

29. In our view, if indeed the appellants had seen a wizard in their homestead that night, and they decided to teach him a lesson, why did they send away PW6 when he went to enquire as to what was happening? In any event, the deceased was well known to the witnesses and none of them said that he was a wizard. There is also no law that allows anybody to kill wizards. There was sufficient evidence to prove that the appellants engaged in unlawful acts of beating up the deceased, for whatever reason, resulting into his death. The chain of events from the time PW6 heard noises and went to check what was happening at the neighbour's and saw the appellants armed with pangas and stones and he was ordered to return to his house, to the time he was called the following morning by the same neighbours and informed that they had killed a wizard who turned out to be the deceased herein was unbroken. This, coupled with the recovery of the blood stained exhibits in the appellants' compound leaves us with no doubt that it was the appellants who killed the deceased. Actus reus was, therefore, proved.

30. Malice aforethought is defined in section 206 of the Penal Code as, inter alia;

- “(a) an intention to cause the 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) ...”

The courts have also expounded on the above definition and there is a wealth of jurisprudence in this area. For instance, in *Hyam -vs- DPP [1974] A.C* the Court held that:

“the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased”

31. In *Rex -vs- Tubere s/o Ochenn [1945] 12 EACA 63* the predecessor of this Court laid down some guidelines in regard to proving of malice aforethought. The Court stated:

“The duty of the court in determining whether malice aforethought has been established is to consider the nature of the weapon used, the manner in which it is used, the part of the body injured, the conduct of the accused before, during and after the attack”.

The prosecution had the burden to prove that the appellants had the intention to cause the death of or to do grievous harm to the deceased; that they had the knowledge that their act or omission would probably cause the death of the deceased or they did not care whether such acts could lead to the death of the deceased. The nature of the injuries causing death, the gravity of the same and the weapon used are good indicators as to the appellants' intention.

32. According to the doctor who carried out the post mortem, the body of the deceased had multiple deep cuts on the skull frontal region, back and temporal region. He also had broken ribs and limbs and the



doctor's conclusion was that the cause of death was due to head injury and trauma as indicated in the post-mortem report. Those were multiple, serious injuries and there is no doubt that the appellants had the intention of either killing the deceased or causing him grievous harm. We are satisfied that malice aforethought was proved to the required standard of proof beyond any reasonable doubt.

33. We find that the prosecution discharged its burden to the required standard. The judgment of the trial court was based on sound evidence and the law and we have no basis for interfering with the same. We find the appeal on conviction without merit and dismiss it accordingly.
34. On the sentence, the appellants were sentenced to death. The trial court's sentiments in awarding the death sentence was that the court's hands were tied as the law as it stood then provided for mandatory death sentence for persons convicted of murder. Jurisprudence in that area has since changed following the Supreme Court's pronouncement in Francis Karioko Muruatetu & another vs Republic & 5 others (2017) eKLR that the mandatory nature of the death sentence is unconstitutional. Courts now have discretion to impose any sentence to a maximum of death sentence after considering the mitigation tendered by the accused person, the circumstances of the case and the Judiciary Sentencing Guidelines. Although we were not addressed on the issue of sentence, that does not stop us from exercising our discretion to reduce the sentences imposed on the appellants. Having considered the circumstances of the case, we allow the appeal against sentence and set aside the death sentence imposed against both appellants and substitute therefor a sentence of 20 years' imprisonment for each appellant, to run from the date the appellants were presented to court for plea taking.

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

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

