Jahoro v Republic (Criminal Appeal 245 of 2018)
[2024] KECA 548 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KECA 548 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 245 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

MAY 23, 2024

BETWEEN

GEORGE OTIENO JAHORO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Kisumu (D.S. Majanja, J) delivered on 10th April, 2017 in HCCR No. 27 of 2009)

JUDGMENT

1. The appellant, George Otieno Jahoro, was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. It was alleged that on the night of 13th June, 2009 at Uloma Sub location, North Uholo Location in Ugenya District within Nyanza Province, he murdered Joseph Ouma Ndhala (herein deceased).

2. The appellant pleaded not guilty to the charge. He was subsequently subjected to a full trial in which the prosecution called a total of 5 witnesses in support of their case, while the appellant gave sworn evidence and called no witnesses.

3. Briefly, the prosecution evidence was that on the afternoon of 13th June 2009 at about 3.00 pm, the deceased and his brother, David Musewe (David), were having a meal in the deceased's house, while the deceased's wife, Syprose Majuma (Syprose), was busy thrashing beans outside. The appellant arrived and asked her where she got the beans and she responded that she had harvested them from her garden. An argument then arose with the appellant alleging the beans had been stolen from his shamba, and the deceased and his wife denying the allegation. The appellant, then, went into the house, pulled the deceased out of the house, then grabbed a jembe from the thatched roof and hit the deceased twice on the back of the head. Thereafter, the appellant threw the jembe in the shamba as he proceeded to

harvest the beans in the shamba and left the scene. The appellant threatened Syprose causing her to run away in fear. The appellant was admitted in Hospital but succumbed to the injuries a week later.

4. Syprose reported the matter to PC Ayub Manyasi (PC Manyasi), who investigated the case. Later, Pc Manyasi and Cpl Moses Tali arrested the appellant along Sigomere –Ugunja Road. He was then charged with the offence. Dr. Raute, who was then attached to Siaya District Hospital, performed a post mortem examination in which he observed that the deceased had a deep cut wound, approximately 3 cm wide, on the scalp and the occipital area involving the entire scalp thickness; and that internally the head revealed an extensive skull haematoma and a fracture at the back of the head with brain injury. The doctor concluded that the cause of death was severe head injury secondary to assault. The report was produced in evidence by Dr John Ayub Ogola

5. The appellant, who gave sworn evidence in his defence, denied having killed the deceased and testified that he had requested the deceased to take care of his shamba since he lived a bit far from it. On the material day, he decided to go and visit the shamba, and on arrival, he found Syprose outside the house while the deceased was in the house with David. He inquired from the deceased about the beans the deceased had taken from his shamba and they disagreed.

   The deceased went back into the house and came back with a jembe. Seeing the deceased angry, the appellant decided to run away and in the process, he took a piece of wood from a nearby pile of firewood and threw it at the deceased. He did not know if the stick hit the deceased.

6. In his judgment, the learned judge found that the deceased died as a result of a severe head injury resulting from an assault. The learned Judge rejected the appellant's version of the events and found that the appellant attacked and injured the deceased, causing the fatal injuries. He found that the deceased was unarmed and noted that the injury on the head of the deceased was inflicted using a jembe in a manner that left no doubt that the assailant intended to cause him grievous harm or death within the meaning of Section 206(a) of the Penal Code, and therefore malice aforethought could be inferred. The learned judge concluded that the charge against the appellant was proved beyond reasonable doubt, convicted the appellant, and sentenced him to death.

7. Aggrieved by his conviction and sentence, the appellant lodged the instant appeal. In his memorandum of appeal, the appellant advanced five grounds of appeal in which he faulted the learned judge for failing to find that the prosecution did not prove the offence; failing to find that the appellant acted in self-defense and had no intention to kill the deceased, and sentencing the appellant to a harsh, excessive, unconstitutional and unlawful sentence.

8. To support the appeal, the appellant contends that in their evidence, the prosecution witness did not deny that an altercation took place between the deceased and the appellant, over missing beans; that during the altercation the deceased picked a jembe and aimed at the appellant. The appellant in self-defense picked a piece of firewood and threw it at the deceased and he was not sure if it hit him, or the extent of the injuries the deceased might have suffered. The appellant contended that in her evidence, Syprose stated that there was a hole outside their house which the deceased fell in and hurt himself with the jembe. On self-defense, the appellant argued that there is no rule that requires one to wait to be struck before striking back in self-defense. He cited Ahmed Mohammed Omar & Others vs Republic (2014) eKLR.

9. With regards to the sentence, the appellant conceded that he was convicted and sentenced to death as provided by the law, but in view of the finding by the Supreme Court in Francis Kariokor Muruatetu and Another vs Republic (2017) eKL (Muruatetu 1) that the mandatory nature of the death sentence is unconstitutional, the death sentence should be set aside.

10. At the plenary hearing, learned counsel Ms. Awour appeared for the appellant, while learned prosecution counsel Mr. Okoth, appeared for the respondent. In a brief highlight on sentencing, Ms. Awour relied on Muruatetu 1 where, she said, the Supreme Court declared mandatory death penalty unconstitutional and prayed that the death sentence be set aside.

11. In rebuttal, Mr. Okoth urged the court to uphold the conviction as the prosecution case was proved beyond reasonable doubt. On malice aforethought, counsel submitted that in their evidence, Syprose and David stated that they saw the appellant hit the deceased on the head with a jembe, and the post-mortem report indicated the cause of death as severe head injury secondary to assault. On the sentence, Mr. Okoth noted that the learned judge stated that the law provided death as the only sentence as such counsel left it to the court's discretion.

12. We have considered the record of appeal, the submissions by counsel, the authorities relied upon, and the law. The main issue that we discern for our determination is whether the charge of murder was proved against the appellant, and whether the sentence imposed was excessive or unconstitutional.

13. This being a first appeal, this Court's mandate is anchored on Section 379(1) of the Criminal Procedure Code, which allows for appeal from the High Court exercising its original jurisdiction, to this Court, on both matters of law and fact.

14. As the first appellate Court determining such an appeal, the Court must bear in mind its duty as enunciated by this Court in Okeno v. Republic [1972] EA 32 as follows:

> " 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 was some evidence to support the lower court's finding 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] E.A 424." See also Kariuki Karanja –vs- Republic 1986 KLR 190"

15. Under Section 203 of the Penal Code, for the offence of murder to be established, the prosecution must prove three main elements. First, that the death of the deceased occurred, second, that the death was caused by an unlawful act or omission on the part of the accused person and third, that the accused person had malice aforethought in causing the act or omission.

16. The ingredients of murder were identified by this Court in Roba Galma Wario v Republic [2015] eKLR as follows:

> " For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."

17. The fact of the deceased's death is not in dispute and was clearly established by the evidence of the witnesses. David and Syprose witnessed the appellant assault the deceased, while Dr. Raute conducted a post-mortem on the body of the deceased after his death,and concluded that the cause of death was a severe head injury secondary to assault. From our evaluation of the evidence, it is clear that the injury was inflicted upon the deceased by the appellant. Contrary to the appellant's plea of self defence, there is no evidence that there was any imminent danger of him being attacked by the deceased. The appellant

was the aggressor and the one who pulled the jembe from the thatched roof, and attacked the deceased who was not armed. His reaction was not in self defence, and the learned Judge was justified in rejecting this defence.

18. The question that follows is whether the appellant inflicted the injury upon the deceased with malice aforethought. Under Section 206 of the Penal Code, malice aforethought is defined as follows:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-
>
> 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. An intent to commit a felony;
>
> d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

19. The evidence given by prosecution witnesses showed that the appellant viciously attacked the deceased and hit the deceased with a jembe twice on the head, thereby inflicting serious injuries that led to the deceased's death. Given the weapon used, the force and the part of the body attacked, it is evident that the appellant must have intended to kill the deceased or to cause him grievous harm. Malice aforethought can therefore be inferred under Section 206(a) of the Penal Code. Accordingly, we uphold the appellant's conviction, as the learned Judge was right in finding the offence murder proved against the appellant.

20. On sentence, the appellant complains that the sentence of death imposed upon him is not only harsh and excessive, but is also unconstitutional. Under Section 379(1)(a) & (b) of the Criminal Procedure Code this Court's jurisdiction to entertain an appeal against a sentence from the High Court is stated thus:

> " 379. Appeals from High Court to Court of Appeal
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> 1. A person convicted on a trial held by the High Court and sentenced to death, or to imprisonment for a term exceeding twelve months, or to a fine exceeding two thousand shillings, may appeal to the Court of Appeal—
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> a. against the conviction, on grounds of law or of fact, or of mixed law and fact;
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> b. with the leave of the Court of Appeal, against the sentence, unless the sentence is one fixed by law."

21. The appellant has challenged the lack of exercise of discretion in sentencing by the trial Judge, and the unconstitutionality of the sentence. These are issues of law which are within our jurisdiction under Section 379(1)(a) of the Penal Code.

22. The record shows that in sentencing the appellant the learned Judge stated that:

> "The law provides for only one sentence, and it is death. I accordingly sentence George Otieno Jahoro to death in accordance with law."

23. The sentence passed on the appellant was imposed before the Supreme Court's decision in Muruatetu 1. The position stated by the learned Judge was, then, the correct position, but as observed by the Supreme Court in Muruatetu 1, the sentencing discretion of the trial courts was hamstrung by Section 204 of the Penal Code which provided for death as the only sentence. It is only fair that we intervene for as held by the Supreme Court in Muruatetu 1, the mandatory nature of the death sentence in Section 204 of the Penal Code renders it unconstitutional.

24. The impact of the decision in Muruatetu 1, as this Court stated in John Gitau Gachiri vs Republic (2019) eKLR, is:

> "What this means is that a Judge who finds an accused person guilty of murder has the discretion to impose any sentence, death penalty being the severest sentence that can be imposed."

25. In the circumstances, this being a first appeal in which this Court has jurisdiction to do what the trial Judge ought to have done, we deem it appropriate to exercise judicial discretion in sentencing, by imposing an appropriate sentence, taking into account the appellants mitigating circumstances as stated to the trial Judge, and also taking into consideration the gravity of the offence, the brutality displayed by the appellant, and the traumatic effect of the heartless and fatal assault, on the deceased's family. In all the circumstances of this we think a jail term of 30 years' imprisonment would be appropriate.

26. Accordingly, we dismiss the appeal against conviction, but allow the appeal against sentence to the extent of setting aside the death sentence that was imposed on the appellant, and substituting thereto a jail term of 30 years' imprisonment with effect from 27th July 2009, which is the date the appellant was first arraigned in court, as he remained in custody throughout his trial.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF MAY, 2024

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR