Wangari v Republic (Criminal Appeal 9 of 2016)
[2024] KECA 477 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KECA 477 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 9 OF 2016

F SICHALE, FA OCHIENG & WK KORIR, JJA

MAY 9, 2024

BETWEEN

JAMES MATHU WANGARI ..... APPELLANT

AND

REPUBLIC ..... REPUBLIC

(An Appeal from the Judgment of the High Court of Kenya at Naivasha (Hon. C. Meoli, J.) delivered and dated 12th February, 2016 in HCCRC No. 20 of 2015)

JUDGMENT

1. James Mathu Wangari, the appellant herein, was charged and convicted for the offence of murder contrary to section 203 as read with 204 of the Penal Code and subsequently sentenced to suffer the death penalty. The information was that on 21st February 2015 while at Sulmac Trading Centre within Nyandarua County, the appellant jointly with his co-accused murdered Isaac Kimotho Ndungu. His co-accused was acquitted after the trial.

2. In his memorandum of appeal, the appellant raises 13 grounds of appeal which we summarize as follows: that the case was not proved to the required standards; that the burden of proof was shifted to the appellant without the prosecution first discharging its burden; that the prosecution's case was marred with doubts, inconsistencies, contradictions, and discrepancies going to the root of the case; and that the trial Court erred in disregarding the appellant's defence without giving reasons.

3. At the trial the prosecution called five witnesses. Margaret Wangechi Maru (PW1) testified that on 21st February 2015 she was working as a bar attendant at South Park bar also known as Migingo club in Sulmac when the deceased came to the bar already drunk at about 10.00 pm and sat by himself at a table. The appellant who was already in the bar then ordered a drink for the deceased but the deceased declined to take the drink. The appellant forced the deceased to take the drink by pushing the bottle into his mouth. After drinking the alcohol, the deceased lay his head on the table facing down.

It was at that moment that the appellant then lifted the deceased's head and banged it against the wall demanding for money. The deceased rested his head on the table once more. One Richard assisted the appellant to take the deceased outside the bar.

4. Monica Mungai (PW2) on her part testified that on the material day she was manning the Counter at Migingo bar when the deceased came in at around 10.00 pm. He was already drunk. The appellant who was already at the bar then invited the deceased to his table and ordered a drink for the deceased. The deceased declined the drink but the appellant forced the bottle into his mouth. She noticed the appellant and the deceased argue but she was not able to hear what exactly the argument was about. The appellant then got hold of the deceased and hit his head against the wall and thereafter started dragging the deceased out of the bar when one Richard intervened. The witness denied being aware that the deceased had been operated on the head at Kijabe Hospital as a result of injuries received in a road traffic accident.

5. Dr. Titus Ngulungu (PW3) testified that he conducted a postmortem on the deceased's body at Nakuru Provincial General Hospital on 24th February 2015. He observed that the deceased's body was of an African male with good nutrition status and the body had been refrigerated. He noted that the deceased's body had cyanosis due to lack of oxygen prior to death. The body also had swelling on the right-hand side. Internally, PW3 observed that there were two circular bruises on either side of the head and three at the back of the head. The skull was not fractured but upon opening, he observed that there was a concussion and increased intracranial pressure build up. He noted that the brain was pressed against the cranial cavity while the stomach showed diffuse gastritis which is typical of people with head injuries. He concluded that the deceased died as a result of multiple trauma to the head due to assault. He produced the postmortem report as an exhibit. The witness denied noticing a scar of previous surgery on the deceased's head. He also pointed out that in treatment for meningitis, a patient is always given antibiotics and the head is not drilled. PW3 discredited a report alleging that the deceased had previously undergone brain surgery shown to him by the defence and noted that the treatment indicated in the report was inconsistent with the illness stated therein. His testimony was that all the injuries were acute.

6. Simon Ngunjiri Wathiga (PW4) testified that on the material day, he delivered some food to the Migingo club owner and was invited for a drink. While at it, the deceased came into the club and as he was about to leave, the appellant called him back. The deceased reluctantly came back and joined the appellant's table after which the appellant ordered for him a drink. The deceased lay his head on the table but the appellant woke him up and banged his head against the wall twice. The appellant then forced the drink into the deceased's mouth after which the appellant and one Richard took the deceased outside the premises.

7. Police Constable Charles Otene (PW5) on his part recounted how he received a report from the deceased's brother on 22nd February 2015 informing him that the deceased had been found dead. Alongside PC Mutai, they proceeded to the scene and collected the body. They investigated the matter and on the night of 12th March 2015, they proceeded to the village where they arrested several suspects including the appellant. At the conclusion of the investigations, they narrowed down on the appellant and his then co-accused as the people who killed the deceased.

8. Upon being placed on his defence, the appellant in his unsworn testimony denied the charges. He admitted being at the bar on the material night where he took beer. He stated that while leaving the bar, he met the deceased outside having a chat with his uncle. He proceeded home and was later arrested after three weeks for drinking after the statutory hours and later charged with the murder of the deceased.

9. In finding the appellant guilty, the learned Judge ruled that malice aforethought was deducible from the violence of the appellant's actions and the fact that he did not take any measures to secure the deceased the necessary medical attention while he lay outside the bar. The learned Judge also pointed out that despite informing PW2 that he would escort the deceased home, the appellant abandoned him at the doorstep of the bar. The learned Judge acquitted the appellant's co-accused of the charge of murder noting that the appellant was the last person seen with the deceased. The trial Judge proceeded to sentence the appellant to suffer death.

10. This appeal came up for hearing before us on the virtual platform on 27th November 2023. Learned counsel Ms Odhiambo appeared for the appellant and sought to rely on her written submissions dated 1st May 2023. Learned counsel Ms Kisoo was present holding brief for learned counsel Mr. Ondimu for the respondent. Ms Kisoo also opted to wholly rely on the respondent's written submissions dated 16th August 2023.

11. Ms Odhiambo commenced her submissions by referring to the case of Okeno v. Republic [1972] EA 32 to outline the all- encompassing jurisdiction of this Court on a first appeal. In support of her argument that the prosecution failed to prove its case beyond reasonable doubt, counsel stated that the circumstantial evidence relied upon by the trial Judge to convict the appellant was incomplete as it failed to prove that the appellant participated in the unlawful act that led to the deceased's death. Counsel also submitted that the evidence of PW1, PW2 and PW4 was contradictory as to what transpired between the deceased and the appellant hence malice aforethought was not proved. Ms Odhiambo also argued that the prosecution did not establish a link between the appellant and the cause of the deceased's death as no witness testified having seen the appellant murder the deceased. Counsel additionally submitted that the learned Judge erred by failing to consider the medical report from Kijabe Hospital which proved that the deceased had sustained head trauma injuries as a result of a motorcycle accident. Counsel relied on the decisions in Ahamad Abolfathi Mohammed and Another v. Republic [2018] eKLR and Sawe v. Republic [2003] KLR 364 to buttress her submission that circumstantial evidence can only result in a conviction where the evidence unerringly links the accused to the death of the deceased. Turning to the death sentence imposed upon the appellant, counsel urged that the same was manifestly excessive and harsh. Further, that the Court did not consider all the circumstances of the case before imposing it. Counsel relied on the Supreme Court decision in Muruatetu & Another v. Republic [2017] eKLR to submit that the death penalty imposed on the appellant was illegal as it was handed down its mandatory nature. Counsel consequently urged us to allow the appeal in its entirety.

12. On her part, Ms Kisoo for the respondent relied on David Njuguna Wairimu v. Republic [2010] eKLR and section 379 of the Criminal Procedure Code to highlight the jurisdiction of this Court on a first appeal. Counsel then referred to section 203 of the Penal Code to elucidate the ingredients of murder. She submitted that the evidence of PW5 and PW3 confirmed the fact of the deceased's death which, she submitted, was also unlawful. Counsel submitted that the evidence of PW1, PW2 and PW4 confirmed that the appellant banged the deceased's head against the wall. Counsel, however, submitted that malice aforethought was not proved as the evidence of PW1, PW2 and PW4 was contradictory as to how many times the deceased's head was banged against the wall. According to counsel, the evidence of PW4 was that the appellant attempted to wake the deceased and that this would not amount to malice aforethought. Rejecting the appellant's claim that there were inconsistencies in the evidence of the prosecution witnesses, counsel asserted that such inconsistencies, if any, were minor and did not go to the root of the prosecution case, hence should be ignored. In conclusion, learned counsel for the respondent urged us to allow the appeal against conviction for murder and substitute it with a

conviction for manslaughter. As for sentence, learned counsel was of the view that a sentence of 10 years in prison would fit the lesser offence of manslaughter.

13. This is a first appeal and our mandate is therefore anchored on section 379(1) of the Criminal Procedure Code which allows for appeals to this Court on both matters of law and fact. The reach of this particular jurisdiction has continuously been emphasized by this Court in several decisions including Dickson Mwangi Munene & another v. Republic [2014] eKLR where it was stated that:

> "This being a first appeal, this Court is obliged to re- evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge's finding of fact unless it is supported by the evidence on record."

14. In discharging our mandate as already outlined above, we have reviewed the record of appeal and the submissions by counsel for the parties. In our view, the core issue for determination is whether the appellant's conviction was backed by the evidence on record and, if so, whether the death sentence was appropriate in the circumstances of this case.

15. We start by addressing the propriety of the conviction. The appellant was charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The provisions state as follows:

> "
>
> " 203. Murder
> Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
>
> 204. Punishment of murder
>
> Any person convicted of murder shall be sentenced to death."

16. To prove an offence of murder, the prosecution must establish the fact and cause of the death of the deceased person; that the accused person is at fault for contributing to the deceased's death through an unlawful act or omission; and, that the accused person had malice aforethought in causing the death. In that regard, the Court in Roba Galma Wario v. Republic [2015] eKLR identified the ingredients of the charge of murder thus:

> " 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. In this case, the evidence of PW5 was that on 22nd February 2015, alongside PC Mutai, they received a report of a body which was lying at Sulmac Trading Centre. PW3 on his part confirmed having conducted a postmortem on the deceased's body on 24th February 2015. This evidence which was not challenged by the defence confirmed that the deceased was indeed found dead.

18. Regarding the cause of death, PW3 noted numerous injuries on the deceased's head prior to concluding that the deceased died as a result of multiple trauma to the head due to assault. In the submissions before this Court, counsel for the appellant has faulted the trial Court for not considering a medical report from Kijabe Hospital which showed that the deceased had previously sustained head trauma injuries

as a result of a motorcycle accident. From the record, we note that the said medical report was only marked for identification and never produced. In our view, such a document, marked for identification but not produced as exhibit, did not form part of the record and the trial Court could not rely on it. In other words, such a document could not oust the evidence of PW3 with regard to the cause of the deceased's death. Discussing the evidential value of a document that has not been produced as an exhibit, the Court in Kenneth Nyaga Mwige v. Austin Kiguta & 2 others [2015] eKLR stated that:

> "Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account."

19. We find no fault on the part of the trial in opting not to consider the alleged medical report. As we have already stated and as pointed out by the trial Court, the report was only marked for identification but was not produced as an exhibit for the Court to consider. It is our finding therefore that the deceased's cause of death was as evidenced by PW3, that is, multiple trauma to the head due to assault using blunt force.

20. Even if there was indeed a document that showed that the deceased had previously suffered head injuries as a result of road traffic accident or even undergone head surgery, such evidence could not have undermined that of PW3 who performed post- mortem on the body of the deceased and concluded that he died of recent injuries to the head. The evidence of the pathologist was consistent and corroborative of that of the eyewitnesses who saw the appellant bash the deceased's head against a wall.

21. The next issue is whether the appellant is at fault for contributing to the deceased's death through an unlawful act or omission. As to what transpired on the night of 21st February 2015, the evidence of PW1, PW2 and PW4 which we have extensively reproduced above is critical. According to these witnesses, it emerges that the appellant was already within Migingo bar when the deceased arrived. It is also undisputed that the appellant offered the deceased a drink and the deceased was reluctant in accepting the offer. PW4 testified that even though the deceased attempted to leave the premises, the appellant brought him back. The witnesses attest to the fact that the deceased was already drunk at the time. Further, all the eyewitnesses testified that the appellant forced alcohol by the bottle into the deceased's mouth. From the evidence of PW1 and PW2, the appellant and the deceased had an argument. In his defence, the appellant denied ever sitting with the deceased in the bar on that day. This was despite the appellant being placed with the deceased at the scene, his actions being described by the witnesses and also, being left with the deceased on the material night. The appellant admitted being at the scene of crime on the material date and time. In light of the foregoing, it is our view, and so we find, that the appellant's act of banging the deceased's head against the wall led to the deceased's death.

22. Another element of the offence of murder that the prosecution needed to establish was that the appellant had malice aforethought when he caused the deceased's death. In this appeal, both the appellant and the respondent have faulted the learned Judge for what they deem as the failure to

undertake a proper consideration of all the evidence. The ingredients of malice aforethought are enumerated in section 206 of the Penal Code as follows:

> "(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."

1. In Nzuki v. Republic [1993] eKLR, the Court had the following to say with regard to malice aforethought:

> "Without an intention of one of these three types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder. See the case of Hyam v Director of Public Prosecutions, [1975] AC 55.
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> In an appeal such as the present one, any one of the intentions set out above is a necessary constituent of the offence of murder contrary to section 204 of the Penal Code and the burden of proving any such intention is throughout on the prosecution. No doubt, if the prosecution prove an act the natural consequence of which should be a certain result and no evidence or explanation is given, then the Court may, on a proper direction, find that the accused is guilty of doing the act with the necessary intent, but if on the totality of evidence there is room for more than one view as to the intent of the accused, the Court should direct itself that it is for the prosecution to prove the necessary intent to its satisfaction, and if, on a review of the whole evidence, it either thinks that that intent did not exist or it is left in doubt in respect thereof, the accused should be given the benefit of that doubt. Thus, where on a charge of murder the evidence does not exclude the reasonable possibility that an accused person killed the deceased by an unlawful
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> act but without the intent necessary to constitute legal malice requisite to the proof of that offence, that killing would only amount to manslaughter. See Rex v Steane, [1947] 1 KB 997; and Sharmpal Singh s/o Pritam Singh v R [1960] EA 762."

24. There is no doubt and we have so held, that the injuries resulting into the deceased's death were as a result of the appellant's actions. It is therefore necessary to ascertain whether the said actions were done with malice aforethought. Counsel for the respondent pointed out that the evidence of PW1 and PW2 was that the appellant hit the deceased once while PW4 testified that the appellant hit the deceased's head against the wall twice in an attempt to wake him up. In our view, the contradiction as to the number of times the appellant banged the deceased's head against the wall is immaterial. From the evidence of PW3, he observed that there were two circular bruises on either side of the head and three at the back of the head of the deceased. There is also evidence that despite the deceased willing to leave the scene, it was the appellant who either implored upon him or forced him to stay. Additionally, PW1,

PW2 and PW4 all testified that the appellant forced the deceased to take the alcohol he had bought for him. The evidence of PW4 is further troubling when he says that:

> "Jimmy [the appellant] woke him up and pushed his head twice on the wall. He forced his mouth open and poured remaining drink into his mouth."

On cross-examination he stated that:

> "After two sips the deceased placed head on table and Jimmy forced mouth open. As he woke him up, he pushed him against the wall. He was forcing him to take the beer. Yes, he was feeding him with beer, he hit his head against the wall."

25. The picture created by this evidence does not portray a man not hellbent in occasioning a neighbour grievous harm contrary to the submission of counsel for the respondent. The evidence of PW4 considered in light of the evidence of PW1 and PW2 that the appellant had an argument with the deceased over money owed leaves no doubt that the two were not strangers to each other. Additionally, the evidence of PW1 and PW2 is that they left the deceased lying down and the appellant informed them that he was waiting for the deceased to sober up before he could escort him home. We also note that having overfed the deceased with alcohol, banged his head on the wall more than once, and now the deceased lay down, the appellant did not bother ascertaining the wellbeing of the deceased. He neither took him to hospital for medical attention nor informed his relatives of the injuries he had inflicted on the deceased. Instead, he left him in death throes or lying dead and went on with his life. In light of the foregoing, we are convinced that the learned Judge aptly analyzed the evidence on record and correctly found that malice aforethought was established. In the end, the appeal against conviction lacks merit as the prosecution proved all the elements of the offence of murder.

26. The next issue for our determination is whether we should interfere with the sentence imposed by the trial court. The appellant's challenge to the sentence is that it is not only harsh and excessive in the circumstances of this case but is also illegal. The death sentence having been imposed as one fixed by law, the appellant is by virtue of section 379(b) of the Criminal Procedure Code entitled to the second opinion of this Court on that sentence.

27. We have reviewed the trial Court's record on sentence and we note that the death penalty was handed down in its mandatory nature. We also note that the appellant was not accorded an opportunity to tender his mitigation as it is only the prosecution's statement to the Court that is recorded. The sentencing proceedings therefore offend the provisions of section 323 of the Criminal Procedure Code. We however note that even in such instances where there is no opportunity accorded to an accused person to mitigate, such failure has no effect on the validity of the proceedings. We do not blame the trial Judge for imposing the death sentence provided by section 204 of the Penal Code in its mandatory nature. This was done in 2016 when the prevailing jurisprudence was that the only sentence available for the offence of murder was death. However, on 14th December 2017 a seismic jurisprudential shift occurred when the Supreme Court declared in Francis Karioko Muruatetu & Another v. Republic [2017] eKLR that the mandatory nature of the death sentence provided for murder under section 204 of the Penal Code was unconstitutional.

28. On the basis of the foregoing, we accept the appellant's invitation to review his sentence. Though the appellant did not tender his mitigation before the trial Court, we note that he was regarded as a first offender. Before us, counsel has pleaded for a lenient sentence. He referred to two decisions where the Court reduced the sentence of life imprisonment to 10 years and urged us to adopt a similar view in this appeal. We must, however, point out that the two decisions, to wit, Gedion Kenga Maita v. Republic [1997] eKLR and Bernard Seneyo Letikirich v. Republic [2006] eKLR, were in relation to the offence

of manslaughter and not murder as in the present case. The cited decisions are therefore not applicable to the appeal before us. The flipside to the appellant's plea for a lighter sentence is the fact that an innocent life was lost. Termination of life in violation of the law is not a matter to be treated flippantly.

29. In the circumstances of this case, we have considered the mitigating and aggravating circumstances which we have alluded to above. We have also considered the emerging jurisprudence from this Court in respect to sentences for murder. We have also noted that the appellant was in custody for approximately 1 year before he was convicted and sentenced. In the circumstances, a sentence of 30 years in prison suffices.

30. In conclusion, the appeal against conviction is without merit and is hereby dismissed. The appeal against sentence is merited and partially succeed. Consequently, the death penalty as passed by the High Court is hereby set aside. The appellant is instead sentenced to serve 30 years in prison. By virtue of the proviso to section 333(2) of the proviso to the Criminal Procedure Code, the sentence will run from 16th March 2015 when the appellant was first arraigned before the trial Court.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2024

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR