Maruti & 2 others v Republic (Criminal Appeal 180 of 2017)
[2024] KECA 703 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 703 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 180 OF 2017

PO KIAGE, F TUIYOTT & WK KORIR, JJA

JUNE 21, 2024

BETWEEN

JAMES WANJALA MARUTI ..... 1ST APPELLANT

GEOFFREY MARUTI FAIDA ..... 2ND APPELLANT

UPSET WANYONYI SIMBUKI ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Bungoma (A. Aroni, J.) Dated 2nd November, 2017 in HCCRA No. 24 of 2012)

JUDGMENT

1. Prior to his death on 30th April, 2012 at [Particulars Withheld] Village of Bungoma County, ASM (the deceased) was suffering from a mental health disorder as a result of Cerebral Malaria. The disorder caused him to stray out of the house of his brother, PNM (PW1) and, sadly, into the hands of a group of people who turned violent against him on mistaking him for a thief.

2. In an information filed by the Director Public Prosecutions (DPP) before the High Court at Bungoma in Criminal Case No. 24 of 2012, the DPP informed the Court that James Wanjala Maruti (1st Appellant), Geoffrey Maruti Faida (the 2nd Appellant) and Upset Wanyonyi Simbuki (the 3rd Appellant) had murdered the deceased. On 5th December, 2012 the information was amended to include Joseph Kakai Mulati as the 4th Accused person. The fourth accused later died on 11th January, 2017, in the course of trial.

3. After considering the evidence at trial which comprised seven (7) prosecution witnesses and three (3) in defence, the trial court (Ali Aroni, J) (as she then was) found the appellants guilty of murder contrary

to section 203 as read with 204 of the Penal Code and sentenced each one of them to death. Aggrieved by that decision, the appellants are now before us on a first appeal.

4. On conviction, this appeal substantially criticizes the trial court for returning its verdict on the evidence of PW1, PW2, PW3, PW4 and PW7 which we are told was improper identification evidence and not free of error as the incident occurred just before sunrise.

5. It was submitted by Ms. Lore, learned counsel for the appellants that despite the incident occurring at sunrise, none of the witnesses positively identified the appellants at the scene. It was contended that it would be a very rare coincidence that PW1, PW2, PW3, PW4 and PW7, after trying to locate the whereabouts of the deceased, simultaneously and without error would observe the appellants assault the deceased yet fail to identify and indicate who amongst the appellants was holding which weapon. Further, that none of the witnesses gave a clear picture as to the position of the appellants on during the attack.

6. It was pointed to us that it was the evidence of PW4 that there was a mob of about 20 people baying for the blood of the deceased and it would have been impossible to observe and see the alleged weapons in such a crowded place.

7. On another front the prosecution was accused of conveniently, consciously and deliberately failing to call independent witnesses and relied on only the relatives of the deceased.

8. In response to those submissions, learned Prosecution counsel Patrick Okango submits that the incident happened at 6.00am during sunrise and so the witnesses (PW1, PW2, PW3 and PW4) could clearly see and identify the appellants and even took note of the various weapons they were carrying. That the witnesses even, at some point, interacted with the appellants when informing them that the deceased was sick and not a thief. That since PW1 knew the appellants, it was a case of recognition as opposed to identification.

9. He further disputes the assertion made by the appellants that the deceased died of cerebral malaria and points us to the evidence of PW7 (Dr. Kiplangat) whose post-mortem report indicated the cause of death as cardiorespiratory arrest due to severe head injury following physical assault.

10. Lastly, he submits and urges this Court to find that the evidence on record proved malice aforethought was present despite the lack of elaboration on the part of the learned trial Judge. That the intention to cause grievous harm by assaulting the deceased with a hoe, a panga and whip occasioning the injuries that led to his death was enough proof.

11. As a first appeal Court we are duty bound to re-evaluate the evidence afresh and to draw our own conclusion having regard to the fact that, unlike the trial court, we did not see or hear the witnesses testify and due allowance must be given for that handicap. See *Okeno v. Republic* [1972] EA 32:

> "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 v. R.*, [1957] E.A. 336) and to the appellant court's own decision on 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."

12. The evidence of PW1 was that on the morning of 30th April, 2012, he got up at 5.30am to find that the deceased had left the house. He reached out to his neighbours Simon Simiyu (PW2), Richard Kundu Wanyama (PW3) and Felix Amutala to help search for his brother. Together, they heard shouts of "thief, thief" and headed in the direction of the noise. On reaching there, PW1 saw people assaulting the deceased. The 1st Appellant, who was armed with a hoe, cut the deceased on his back, the 2nd Appellant had a panga which he used to inflict cut wounds to his head, while the 3rd Appellant whipped him. All three are known to PW1 who in fact knows the home of the first two.

13. PW2 was called out by PW1 at around 5.45 am to 6.00 am. On reaching a place called Checkpoint, they saw people near a road to [particulars withheld] School. He was able to identify the three appellants, who were known to him, assaulting the deceased. He gave similar evidence as PW2 as to who was armed with what.

14. PW3, too, gave a similar account in his evidence. His testimony, was, that standing about 20 meters away from the violent scene:

> " Between checkpoint and [particulars withheld] School, I saw 3 people. 1st had a hoe, I saw him cut the deceased. I was about 20 meters away. 2nd accused had a panga. I witnessed him cut the deceased. The 3rd accused was standing far with other people. 4th had a panga. 3rd accused was carrying a whip."

15. On that morning David Wangila Simiyu (PW4) left for work from his home in [particulars withheld] village. When he got to Check Point near [particulars withheld] School he heard noises and headed in the direction they came. He found the four people who had been charged assaulting the deceased. There was also a fifth person. When he sought to inquire what was wrong, the 1st appellant turned to him and threatened to assault him with a hoe. He says he was able to see the assailants as it was about 6.00am. The 2nd appellant was armed with a rungu and *panga*, the 3rd appellant had a whip and the 4th accused a *panga*.

16. One of those who joined the search party for the deceased was Fredrick Simiyu (PW6). He and other members of the team had walked for about half a kilometer when they heard some noises, with people shouting "thief thief." On moving closer, he saw that the person who was under siege was the deceased. They pleaded with the mob that the deceased was not a thief. It was this testimony that he saw the 1st and 2nd appellants armed with pangas while the third had a stick. He also saw another person armed with a hoe (Jembe) but he was not before court.

17. The assault left the deceased with extensive wounds and other injuries and although he was taken for treatment at Webuye District Hospital, the same proved fatal and he succumbed. The extent of the injuries became all too clear from the postmortem report prepared by Doctor Limo Kiplagat and produced on his behalf by Doctor Wambani Milimo (PW6). He noted the following injuries:

> Multiple wounds to the following areas:Bilateral anterior knee jointMid chest around T.4 3cmLeft forearm anteriorOccipital region 7cm longTraverse cut extending to the skullFracture of occipital region and several other scars on head
>
> Internally
> Occipital skull fracture 7cm long.Depression acrossBlood noted

18. PC Richard Kipkorir Tuwei (PW5) investigated the death of the deceased. His investigation led to the conclusion that the deceased was attacked by a mob which included the four people who were arraigned in Court.

19. The 1st appellant, a farmer, is a resident of [particulars withheld]. His defence was that on that fateful day he was asleep in his house when he heard some noise about 500 meters away from his house. He woke up and went to the direction of the noise where he heard that there was a naked person who was suspected to be a thief. Because the man was naked, he thought him to be mad and so returned to his house. He was later to learn that the person had been taken to hospital. He denied assaulting the deceased.

20. The 2nd Appellant gave a similar account while the 3rd appellant's testimony was that at that material time he was milking his cows and later in the day heard about the incident. He denied whipping the deceased or meeting the two co-appellants.

21. It is evident that given the very extensive injuries to the body of the deceased, the person or persons who inflicted them must have had the intention of killing him or at the very least, would know that the blows inflicted would cause him grievous harm or death. Present, would not just be actus reus for the offence of murder but malice aforethought (section 206 of the *Penal Code*). The only substantial issue in this appeal is whether the witnesses positively identified the appellants as part of the people who caused the fatal blows.

22. From the evidence of the eye-witnesses, the incident happened at day break at about 6.00am and there would be sufficient light for them to see what happened. Indeed, there was evidence as to the sufficiency of the light at this time. The evidence of PW1, PW2, PW3, PW4 and PW6 is that at a place called Check Point, they found a man under siege and attack. The evidence of PW1, PW2 and PW3 was consistent as to who was armed with what. The 1st appellant had a hoe, the 2nd a panga and the 3rd was carrying a whip. The evidence of PW4 was slightly different in respect to what the 2nd appellant was armed with. In addition to the panga, it was his evidence that he also had a rungu. As for PW6, the 1st and 2nd Appellants were armed with pangas while the third had a stick. So, in respect to the accounts of five witnesses only that of PW6 differed in respect to how the assailants were armed.

23. The assailants were known to the witnesses by name and the witnesses were able to see them from the natural light of daybreak. Although the appellants state that the witnesses stood at a distance, the evidence emerging is that none of the witnesses was more than 20 meters from the scene and the witnesses in fact engaged the assailants by pleading on behalf of the deceased. The evidence of the witnesses was that of recognition and was sufficient to found a safe conviction notwithstanding inconsistence of the account of one. It is therefore without difficulty that we endorse the following finding by the trial court;

> " In my considered opinion the prosecution witnesses were credible, their evidence cogent and consistent that the accused person with others not before court mistook the accused for a thief and mercilessly beat him occasioning him fatal injuries, the deceased died after a week."

24. On sentence the trial court observed:

> "I have considered the extensive mitigation of each accused person including the medical report on the 3rd accused. I have also considered that none of them has a previous criminal record. Against all the above, the only available punishment of the Offence of murder under our jurisdiction is one and that is the death penalty. Consequently therefore this Court has no power or any colour of right to consider any other punishment"

25. This sentence was imposed prior to the decision in *Francis Karioko Muruatetu & another v. Republic* (2017) eKLR, and the observation of the learned trial Judge reflected the conventional thinking then.

But as correctly conceded by Mr. Okango, learned counsel for the respondent, the appellants should benefit from the current jurisprudence. While counsel for the appellant asked us to reduce the sentence to the period served, the respondent proposed 15 years jail term for each of the appellants.

26. Emerging from the mitigation proceedings before the High Court, all the three appellants have passed their middle-ages. At that time, the 1st appellant was 61 years, the 2nd appellant 57 years and the 3rd appellant was the youngest at 53 years. Time without number our Courts have remonstrated with the culture of mob justice. These fairly senior citizens should have known better than to cause a wholly needless death to a person who, because of a temporary sickness of mind, had walked into their reckless and violent path. Their abhorrent acts call for censure. That said, bearing in mind the ages of the appellants and that they were first offenders, we agree with counsel for the respondent that a sentence of 15 years is proportionate punishment for their acts.

27. In the end we uphold the conviction but set aside the death sentence. Instead, each appellant shall serve a prison term of 15 years from the date of sentence at the High Court.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF JUNE, 2024.

P.O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR