Ngeno v Republic (Criminal Appeal 24 of 2016)
[2024] KECA 757 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 757 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 24 OF 2016

F SICHALE, FA OCHIENG & WK KORIR, JJA

JUNE 21, 2024

BETWEEN

ALFRED KIPYEGON NGENO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kericho (H.I. Ong'udi, J.) delivered and dated 1st September 2016 in HCCR No. 27 of 2010)

JUDGMENT

1. Alfred Kipyegon Ngeno is before us on a first appeal against a conviction for the offence of murder contrary to section 203 as read with 204 of the Penal Code. The information stated that on 27th November 2010 at Tendwet area of the defunct Kericho District within the then Rift Valley Province, the appellant murdered Lydia Chepngetich. He denied the charges and upon his conviction, he was sentenced to suffer death.

2. The appellant was dissatisfied with the judgment of the High Court and vide a memorandum of appeal dated 12th May 2023, he challenges the decision on the grounds that:

   "i. The Honourable Judge erred in law and fact in convicting the appellant while relying on contradicting and insufficient evidence;

   ii. The Honourable Judge erred in law and misdirected himself by sentencing the appellant to death for the offence of murder as a mandatory sentence which was excessive in the circumstances since the mandatory nature of death sentence for the offence is unconstitutional."

3. Six witnesses testified at the trial. Clara Chepkoech Sang (PW1) testified that the deceased was her sister and on 28th November 2010 at about 4.00 pm, the deceased passed by her house on her way to

school. As she was escorting the deceased to the bus stage, they met the appellant whom she knew as the deceased's boyfriend. The appellant forced the deceased to walk back with him and on following them, PW1 heard the appellant warning the deceased not to scream as he would end her life. She also saw the appellant wielding a foot-long knife which he removed from his pocket. PW1 ran towards her house screaming where she alerted her mother-in-law. On returning to the scene, she found the appellant holding the deceased by the neck using one hand. He had the knife on the other hand. The deceased was already injured. When the appellant saw her, he took off. The witness added that the appellant had a child with the deceased.

4. Dickson Siele (PW2) stated that he was the Chief of Tendwet Location. He recalled that on the material day, he received a call from a member of the public at around 4.00 pm informing him that a lady had been stabbed. He rushed to the scene alongside Jackson, an Assistant Chief, where they found the deceased lying on her stomach in a pool of blood. He also testified that the deceased had previously reported to him about her domestic quarrels with the appellant. PW2 then called the police who later came and collected the body.

5. Dr. Gilbert K. Chelangat (PW3) testified on behalf of Dr. Rono who had conducted the postmortem. He produced the postmortem report which showed that the deceased had 9 stab wounds in total. One was on the left chin through the neck.

   Another wound was on the left lumbar region. Other wounds were at the back, left side of the chest, back of the neck and left side of the head. Three stab wounds were on the right side of the abdomen. Internally, the deceased had 2 litres of blood in the chest cavity and a laceration of the left lung. The pathologist concluded that the cause of death was cardiorespiratory arrest due to bleeding in the chest cavity due to a severed left artery.

6. Joseph Gitonga Mugao (PW4), a government chemist, testified on behalf of his colleague Lawrence Kinyua Muturi. He produced an exhibit memo form and a report of the results of the analysis of the exhibits. The report concluded that the DNA profile of the blood contained in the knife and the appellant's shirt originated from an unknown victim.

7. CI Abdirahaman Mohammed (PW5) testified that he was the investigating officer in the matter. He stated that he received a report of a murder incident while at Kericho Police Station. He proceeded to the scene where he found the deceased's body which was bleeding from the back and had several stab wounds.

   In his investigations, he learnt that the appellant waylaid the deceased and stabbed her before taking off from the scene without a shirt. At the scene, he recovered a shirt and a knife which were later submitted to the Government Chemist for analysis. The appellant subsequently surrendered himself and was arrested and arraigned in Court.

8. In his defence, the appellant denied committing the offence. He stated that on 27th November 2010 he reported to work at 7.15 am at Kaisugu Tea Factory. He was there until 5.00 pm when he retired to his home. At his home, he found the deceased and his child where they enjoyed their dinner and later retired to bed at

8. 00 pm. The next day, he left for work in Mombasa and only returned home on 22nd December 2010 at 11.00 pm. Upon his return, he was informed by his father that his wife had died. He reported the matter to the police and on 27th November 2010 he was arrested and charged for the murder of his wife.

9. This appeal was heard on the Court's virtual platform on 28th November 2023. Learned counsel Ms. Mungai appeared holding brief for learned counsel Mr. Orege for the appellant while the respondent

was represented by learned counsel Ms. Kisoo. Counsel for the parties had filed their respective written submissions which they sought to wholly rely on.

10. Counsel for the appellant filed submissions, case digest and list of authorities dated 12th May 2023. Submitting on the first ground of appeal, counsel asserted that the evidence on record was marred with contradictions and inconsistencies hence the offence of murder was not proved. It was argued that the evidence of PW1 was uncertain as to whether the knife was in the appellant's pocket or inside a carrier bag and the witness had also failed to identify the knife at the trial. Counsel further contended that PW1 was not clear about her distance from the scene of stabbing. Counsel additionally submitted that the failure to call PW1's mother-in-law and to produce a report on fingerprints in respect to the knife cast doubt on the prosecution's case. According to counsel, the evidence of the single identifying witness in this case was contradictory and insufficient hence the offence was not proved beyond reasonable doubt. With regard to the sentence, counsel relied on the case of Francis Karioko Muruatetu & Another v. Republic [2017] eKLR in support of the proposition that the mandatory nature of the death sentence for murder is unconstitutional. Counsel therefore urged us to consider the appellant's mitigation plus the period of over 11 years already served in prison and allow the appeal against sentence. The Court was consequently asked to allow the appeal in its entirety.

11. In opposition to the appeal, learned counsel Ms. Kisoo through the submissions dated 2nd June 2023 asserted that the evidence adduced by the prosecution pointed to the appellant as the assailant, and the prosecution therefore discharged the burden of proving the case against him. Counsel rehashed the evidence on record and submitted that there were no inconsistencies nor contradictions as regards the evidence of PW1 since her testimony was elaborate, credible and consistent. Counsel urged us to uphold the appellant's conviction. On the question of sentence, counsel urged that the appellant's mitigation should be balanced against the aggravating circumstances of the case. According to counsel, this case called for a death sentence and that the same should be maintained as passed by the trial Court. In the end, counsel urged us to dismiss the appeal in its entirety.

12. This is a first appeal and by dint of section 379(1)(a) of the Criminal Procedure Code and Rule 31(1)(a) of the Court of Appeal Rules, 2022, we are clothed with the jurisdiction to consider issues of fact and law. This statement of the law has continuously been emphasised by this Court in its judgments, one of them being the decision in 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."

13. We have reviewed the record of appeal, the memorandum of appeal, the submissions as well as the case digest of the parties. In our view the main issue for determination in this appeal is whether the prosecution proved the charge of murder against the appellant, and if so, whether the appellant has made out a case for our interference with the sentence.

14. The appellant was charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code, which 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."

15. In order to prove a charge of murder, the prosecution must establish the fact and cause of death of the deceased person, that it is the accused person whose actions or omissions led to the deceased's death, and, that the accused person had malice aforethought. Thus, in Roba Galma Wario v. Republic [2015] eKLR the Court identified the ingredients of the charge of murder 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."

16. In this case, there was no doubt as to the fact of the death of the deceased. PW1, PW2 and PW5 all testified that they saw the deceased's body without breath at the scene immediately after the incident. Similarly, the appellant in his defence testified that he was informed of the deceased's death by his father upon his return from Mombasa. As to the cause of death, PW3 testified that the deceased died as a result of cardiorespiratory arrest due to bleeding in the chest cavity as a result of a severed left artery. Additionally, no evidence has been adduced to show that the deceased's death was sanctioned by the law, hence we are obliged to find that the death was unlawful.

17. The next issue is whether the appellant was responsible for the deceased's death. The evidence is more circumstantial than direct. Despite PW1 being at the scene before and after the offence was committed, she did not witness the appellant commit the murder. In Joan Chebichii Sawe v. Republic [2003] eKLR the Court, while pointing out the various conditions that circumstantial evidence ought to satisfy before it can form the basis of a conviction, stated that:

> " In order to justify, 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. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused."

18. Going by the above dictum, which we fully associate with, it is apparent that for a conviction to ensue, the circumstantial evidence presented ought to form a chain so complete as to eradicate any doubt of an accused person's innocence concerning the offence charged. The evidence pointing to the appellant's guilt in respect to the death of the deceased was majorly that of PW1 who was in the company of the deceased at the material time. PW1 while walking with the deceased met the appellant who then grabbed the deceased and forced her to walk backwards with him. PW1 testified that she saw the deceased wield a knife before she took off to her house while screaming. Upon her return, she saw the appellant holding the deceased by the neck before he ran away. PW1 also testified that she knew the appellant as he was a boyfriend to the deceased. The deceased and the appellant had a child. The evidence of a relationship between the deceased and the appellant is also corroborated not only by the evidence of PW2 but also by the appellant who testified that the deceased was his wife. Similarly, the evidence of PW4 was that the knife collected at the scene and the appellant's shirt contained blood DNA of unknown origin. PW4 clarified to the Court that they were not given blood samples from the deceased to crossmatch the samples with.

19. The evidence rehashed above puts the appellant as the last person seen with the deceased before her stabbing which led to her death. No one else was with the deceased at the scene of crime at that particular time. This calls into play the doctrine of "last seen with". To this extent, we associate ourselves with this Court's decision in Moingo & Another v. Republic [2022] KECA 6 (KLR) where it was stated that:

> " The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to give a reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the Last Seen doctrine in the prosecution of murder or culpable homicide cases is that, where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased (see the Nigerian case of Moses Jua v the State [2007] PELR-CA/11 42/2006)."

20. The appellant was therefore under an obligation as per the doctrine of "last seen with" to tender an explanation of how the deceased met her death. In his defence, the appellant distanced himself from the vicinity of the incident. He alleged that he was away for work in Mombasa and only learnt of the deceased's death when he came back. The alibi was not credible considering that PW1 squarely placed him at the scene of crime. We also note that the issue of the appellant being away never arose during the cross-examination of this key witness. In our view, the appellant's claim that he only learnt of the deceased's killing several days later was a mere afterthought.

21. Counsel for the appellant also challenged the evidence of PW1 terming it as the contradictory testimony of a single identifying witness. We are not persuaded by this argument. The incident took place in the bright eye of the sun at about 4.00 pm. PW1 therefore had ample light upon which to identify the appellant whom she knew before the incident. The appellant even greeted her before moving onto to the deceased. Therefore, despite being a single identifying witness, her evidence of recognition of the appellant as the assailant in this case was credible and therefore reliable.

22. The other issue is the alleged discrepancies in the evidence of PW1. Counsel for the appellant argued that the witness was not certain where the appellant had kept the knife before brandishing it. In dealing with the question as to how discrepancies in evidence should be treated, the Court in John Nyaga Njuki & 4 Others v. Republic [2002] eKLR stated that:

> " In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."

23. We note that PW1 was giving her testimony on 10th June 2015 over 5 years after the incident. Therefore, as is expected of the human species recollection could not have been 100% and there was bound to be discrepancies. Those discrepancies were, however, inconsequential as they did not go to the root of the case. The discrepancies did not absolve the appellant from the fact that he was seen wielding a knife and so shortly thereafter the deceased was lying dead with stab wounds. In the end, we find that the evidence unerringly pointed to the appellant as the person who stabbed the deceased to death.

24. The next issue is whether the prosecution proved the element of malice aforethought. In Paul Muigai Ndungi v. Republic [2011] eKLR, this Court held that:

> "More particularly, malice aforethought is deemed established by the evidence proving an intention to cause death of or to do grievous harm to any person."

25. In this case, the deceased died as a result of 9 stab wounds which were on various parts of the body including the neck, chest and chin. After stabbing the deceased, the appellant fled the scene only to re-emerge several days later. Additionally, despite the appellant being seen by PW1 prior to stabbing the deceased and the witness screaming for help, the appellant still went ahead and stabbed the deceased. From the foregoing, his intention was, to cause the deceased grievous harm, to say the least. From the evidence of PW1 and PW2, the deceased and the appellant had an affair resulting in the birth of a child. It was also the evidence of PW2 that the deceased had previously reported a domestic disagreement between her and the appellant. The appellant's action of stabbing the deceased 9 times fits within the ambit of section 206(a) of the Penal Code as the injuries confirms the appellant's intention to cause the death of or to do grievous harm to the deceased. Considering the various parts of the body stabbed, we can only conclude that the appellant did not intend that the deceased survive the attack. In the end, we find that the prosecution proved all the elements of the offence of murder against the appellant. Hence, the appeal against conviction is therefore without merit and is hereby dismissed.

26. The final issue in this appeal is whether the appellant has made out a case to justify our interference with the sentence imposed by the trial Court. His counsel argued that the mandatory nature of the death penalty in respect to the offence of murder was declared unconstitutional. He is right because this was the holding of the Supreme Court in Francis Karioko Muruatetu & Another (supra). We have looked at the sentencing proceedings, and we note that the learned Judge handed down the sentence in its mandatory nature. She was correct as that was how the law was understood at that time. The consequence and the nature of the death penalty resulted in the time already spent by the appellant in pre-sentence custody not being taken into consideration. Be that as it may, and in accordance with the Supreme Court decision in Francis Karioko Muruatetu & Another (supra), we find that the appeal on sentence must succeed on the ground that the death penalty was imposed in its mandatory nature.

27. In sentencing, we are to consider both the mitigating and aggravating circumstances. In mitigation, counsel told the trial Court that the appellant was a first offender aged 36 years with an old father while the mother was deceased. Counsel also stated that the appellant was remorseful, a single parent and was pleading for leniency. Further, that the appellant had learnt a lot during his time in remand and was the support system to his siblings. On the other hand, a life was lost in the most heinous manner. Nine stab wounds ended the deceased's life for no apparent reason. A child was left without a mother. By the order of nature, the appellant who had a love affair with the deceased ought to have been her protector and not her terminator. In the circumstances of this case, we find that a deterrent custodial sentence is necessary. In our view, a sentence of 40 years would suffice and that is the sentence we shall impose.

28. The upshot of the foregoing is that the appeal against conviction is without merit and is hereby dismissed. However, the appeal against the sentence partially succeeds. Consequently, the death penalty is hereby set aside and substituted with a sentence of 40 years in prison. It is noted that the appellant was in custody throughout the trial. Therefore, in line with the proviso to section 333(2) of the Criminal Procedure Code, the sentence shall run from 23rd December 2010 when the appellant was first arraigned before the trial Court.

29. It is so ordered.

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

F. SICHALE

…….

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