Sang v Republic (Criminal Appeal E069 of 2022)
[2024] KECA 807 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KECA 807 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL E069 OF 2022

FA OCHIENG, LA ACHODE & WK KORIR, JJA

JULY 12, 2024

BETWEEN

GILBERT KIPTOO SANG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (Hon. H.A. Omondi, J.) delivered and dated 21st February 2019 in HCCR No. 4 of 2013)

JUDGMENT

1. Gilbert Kiptoo Sang, the appellant, was at the High Court charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The information stated that on 14th December 2012 at Timbili village in Songhor Location of Nandi County, he murdered Faith Chepkogei (deceased). The appellant denied the charge and at the conclusion of the trial, he was found guilty of the offence and sentenced to suffer death.

2. The appellant is dissatisfied with the judgment of the trial court on the grounds that: the burden of proof was not discharged by the prosecution; the trial court relied on the uncorroborated evidence of a single witness; the postmortem report was produced by an unqualified witness; the investigating officer was not called to testify; and the death sentence was harsh.

3. The prosecution called three witnesses. Edna Cherop (PW1) testified that on 14th December 2012, the appellant who was her husband returned home drunk at about 6.00 pm. She stated that their child, the deceased, was sleeping on the floor. It was her evidence that the appellant was aggressive and when she inquired from him what had transpired, he retorted that he had been assaulted. He then picked up the deceased baby, strangled her saying that he would kill her. She witnessed the appellant strangle the baby until her mouth remained wide open. Her pleas to the appellant to spare the baby's life fell on deaf ears even as the appellant stated that he would smash the baby's head on the floor. PW1 then

ran away and hid in a neighbour's latrine where she heard a smashing sound. She then sent one Joshua to go and ascertain what had happened only to learn that the baby had died. She later identified the baby's body for postmortem and that is when she saw a crack at the back of the skull.

4. Ezekiel Kiptoo Bitok (PW2) testified that he was an uncle to the appellant and that on the material day, he was in his homestead when he heard people shouting that a baby had been killed. He rushed towards the direction of the screams only to find that a group of 60 people had dragged the appellant from his house and were assaulting him. He intervened and when he entered the appellant's house, he found the baby lying dead on the floor with blood oozing from the ears and nose. He emerged from the house and called the area chief, one James Mutai, and informed him of the incident.

5. Corporal Moses Murigi (PW3) produced the postmortem report as an exhibit.

6. When placed on his defence, the appellant confirmed that PW1 was his wife while PW2 was his uncle and that the deceased was his child. He testified that on the material day, he spent the day working in the fields and later that evening, he went for a drink. He stated that he got completely drunk and did not even know the time he went back home. According to him, he only to woke up the next day at the police station where he was informed that he had killed his child.

7. The appeal came up for hearing before us on 4th February 2024 via the Court's virtual platform. At the hearing, learned counsel Mr. Okungu appeared for the appellant while learned counsel Ms. Tarus appeared for the respondent. Counsel had filed submissions which they both sought to wholly rely on.

8. Based on the submissions dated 20th February 2024, Mr. Okungu submitted that the evidence on record did not support a conviction for murder. According to counsel, the evidence on record established that the appellant was intoxicated and the defence of intoxication as provided in section 13(2) of the Penal Code was thus available to him. Counsel relied on Rex v. Relief [1940-43] EA 71 to urge that the defence of insanity was available to the appellant as he was temporarily insane due to intoxication. Counsel cited Bakari Magangha Juma v. Republic (2016) eKLR in support of his argument that the trial court erred in finding that the appellant had malice aforethought asserting that the evidence on record did not support such a finding.

9. Turning to the appeal against sentence, counsel submitted that the death penalty was harsh in the circumstances of the case. According to counsel, the conduct of PW1 ought to be taken into consideration in determining the appropriate sentence. It was counsel's further contention that the learned Judge did not consider the principles of sentencing in imposing the death sentence. Counsel therefore urged us to interfere with the sentence and reduce it. In the end, counsel urged that the appeal should be allowed.

10. In opposing the appeal through the submissions dated 21st March 2023, Ms. Tarus adverted to section 379(1) of the Criminal Procedure Code and David Njuguna Wairimu v. R. [2010] eKLR to outline our jurisdiction on a first appeal. Counsel submitted that the evidence on record established all the elements of the offence of murder hence the conviction should be sustained. In support of her assertion that the death was unlawful, counsel cited the case of Uganda v. Lydia Draru alias Atim HCT-00-CR-SC-0404 for the definition of what amounts to an unlawful death. Counsel referred to Kiragu v. Republic [1985] eKLR in support of her argument that the appellant had malice aforethought. According to counsel, the defence of intoxication was not available to the appellant as the circumstances of the case did not meet the threshold set in section 13(2) of the Penal Code. Counsel reiterated that the prosecution called sufficient witnesses to establish the offence.

11. Counsel finally urged us not to interfere with the sentence stating that the death penalty was appropriate considering the manner in which the deceased met her death in the hands of the appellant. In the end, it was the counsel's submission that the appeal be dismissed entirely.

12. This is a first appeal and as already appreciated by the counsel for the respondent, our mandate as outlined under section 379(1) of the Criminal Procedure Code is akin to a retrial and incorporates a re-consideration of both facts and the law. The only limitation, which we must take into consideration in determining the appeal, is the fact that unlike the trial court we have not had the opportunity of hearing and seeing the witnesses testify so as to be able to gauge their demeanour. Conscious of our jurisdiction, we have reviewed the record and memorandum of appeal as well as the submissions and authorities relied on by counsel for the parties. In our view, the main point that arises for determination is whether the offence of murder was proved. It is only after we are satisfied that the conviction was sound that we can consider the appropriateness of the sentence imposed upon the appellant.

13. The offence of murder is legislated in section 203 of the Penal Code as follows:

> " Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

14. For a trial Court to return a conviction on a charge of murder, the prosecution must prove 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-see Roba Galma Wario v. Republic [2015] eKLR.

15. In this case, the fact of the death of the deceased minor is not in doubt. PW1, PW2 and the appellant himself all testified that both the appellant and PW1 had a child (the deceased) who lost her life on the material day. The cause of her death was indicated in the postmortem report produced by PW3 as asphyxia and head injury. The appellant consented to the production of the report by PW3. The cause of death as per the postmortem report corroborated the testimony of PW1 on what transpired on the material day. We recall that it was the evidence of PW1 that the appellant held the baby by the neck, strangled her and threatened to smash her head. She also stated that she went into hiding and while in the neighbour's outdoor latrine, she heard a loud bang only to later learn that the child had been killed. PW2 also went to the scene and saw a crack on the deceased's skull. The appellant did not expressly deny being at the scene only stating that he did not know when he returned home from his drinking spree. He also did not deny committing the offence but stated that he was not conscious at the moment and only learnt of the death when he regained consciousness while in police custody. In our view, from the evidence on record, it was clear that the appellant had been linked with causing the unsanctioned death of the minor.

16. Having said the foregoing, what we must grapple with is whether the appellant had a pre-conceived motive to cause the death of the child. In his defence, the appellant pleaded intoxication. PW1 and PW2 did indeed confirm that the appellant was drunk that evening. Section 13 of the Penal Code, upon which the appellant hinges his defence of intoxication provides that:

> " (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
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> 2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—

a. the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

b. the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Cap. 75) relating to insanity shall apply.

4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

5). For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs."

17. Our reading of section 13 above is that intoxication is not a defence per se. However, where the accused person's state of mind is in question due to his or her level of intoxication, a court seized of the matter must establish whether the intoxication was involuntary or whether by reason of intoxication the accused person suffered from insanity whether temporarily or otherwise as to deprive him or her of the ability to form an intention to commit the offence. As per section 13(2) of the Penal Code, intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing. The Court in Bakari Magangha Juma (supra) analysed section 13 of the Penal Code and held that:

> "Under section 13 of the Penal Code, intoxication is not a general defence to a criminal offence, except in the circumstances set out in the section. A person who commits an offence while intoxicated is not ipso facto excused from the consequences of his act. In our view the section affords a defence of intoxication in three situations as follows.
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> The first situation is in what is called involuntary intoxication, where at the time of commission of the act complained of, the accused person does not know that it is wrong or does not know what he is doing, because of intoxication caused without his consent by the malicious or negligent act of another person. In such a case, the court is required to discharge the accused person.
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> The second situation is where the accused person, by reason of intoxication is insane, temporarily or otherwise, so that at the time of commission of the act complained of, he does not know that it is wrong or does not know what he is doing. This situation brings the case within the M'Naghten Rules and the court is required to deal with the accused person in the manner prescribed by the Criminal Procedure Code for accused persons who were insane at the time of commission of the offence, culminating in a special finding of guilty but insane and the detention of the accused person in a mental hospital at the pleasure of the President.
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> The third situation, contemplated by section 13(4), arises where by reason of intoxication the accused person is incapable of forming a specific intent, which is an element of the

offence charged. Sometimes this situation is referred to as "intoxication or drunkenness negativing mens rea"."

18. In Moses Gitonga Macharia v. Republic [2011] eKLR, the Court held that:

> " Whenever intoxication of the offender is in evidence therefore, it is the duty of the court to take it into account in determining whether the mental capacity of the offender was so impaired that he was incapable of forming the intention or mens rea necessary for commission of the offence charged."

19. Similarly, in Said Karisa Kimunzu v. Republic [2007] eKLR, the Court opined that:

> " The intendment of the section is clear. If it be shown in a trial for any offence that at the time the person charged committed the act or made the omission complained of, did not know, by reason of drunkenness or intoxication that such act or omission was wrong or did not know what he was doing and further that the drunkenness or intoxication was brought upon him without his consent, by the malicious or negligent act of a third party, then in such an event, though it be proved that the person charged committed the act or made the omission, yet because of the drunkenness or
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> intoxication, he is entitled to a complete discharge. But if it be shown that the drunkenness or intoxication made him insane, temporarily or otherwise, then he is not entitled to a discharge but is only entitled to have the provisions relating to insane persons applied to him, namely that he committed the act or made the omission but was at the time of doing so was insane.
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> But under subsection (4) the court is required to take into account the issue of whether the drunkenness or intoxication deprived the person charged of the ability to form the specific intention required for the commission of a particular crime. In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the Penal Code. If there be evidence of drunkenness or intoxication then under section 13(4) of the Penal Code, a trial court is required to take that into account for the purpose of determining whether the person charged was capable of forming any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

20. We concur with and adopt the statements made in the cited decisions. It is imperative to appreciate that the defence of intoxication is two-pronged. Where the defence is brought under involuntary intoxication, the accused person should establish that they did not know what they were doing because the drink was maybe spiked or laced with intoxicating substances. This kind of defence will most likely get the accused person off the hook in respect of most crimes. The other aspect is where intoxication may have been voluntary. This defence can only hold where the prosecution is required to prove beyond reasonable doubt that the accused person intended to commit the offence. For instance, in murder, which is the subject of this appeal, the prosecution is required to prove malice aforethought otherwise the conviction will not stand and may result in a conviction of the lesser charge of manslaughter or an acquittal altogether. In the case at hand, the intoxication was voluntary and the ground upon which the appellant could escape a conviction was by demonstrating that the prosecution had not proved malice aforethought. It was upon the appellant to show that he did not know what he was doing. Upon perusal of the trial court's judgment, we note that the trial court properly recognized that the question

of the appellant's intoxication was live and proceeded to consider it. In doing so, the learned Judge stated that:

> " 18. In this instance there was the presence of motive-he actually got to the house, picked the sleeping baby and said he was going to kill her. PW1 pleaded with him to give her the baby to feed but he refused and begun strangling the child, even as she gasped for air.
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> 19. It would have been different if he just walked in and without provocation or prompting, picked the baby and proceeded to strangle it. This situation is easily distinguishable from that which prevailed in the case of NZUKI V R [1993] eKLR where there was complete absence of motive, and the accused simply took a knife and viciously stabbed the deceased several times. Here the mens rea was made clear that he intended to kill the child and he announced that."

21. We do not find any error in the analysis of the trial court on the issue of intoxication. Perhaps to point out the salient features, first, the appellant although drunk, arrived home and despite there being two souls, directed his anger on the defenceless child. He disregarded the pleas by PW1 asking him to stop. He not only strangled the baby but proceeded to bang her head on the floor just as he had threatened to do before PW1 fled the scene. Based on the foregoing, we concur with the trial court's finding on the question of intoxication. Similarly, we find that the appellant, by strangling a 3- month-old baby and banging her head on the floor and after threatening to do so had only one intention, to end the life of the little child. That the appellant was conscious of his surroundings and knew what was happening is confirmed by the testimony of PW1 who testified that when the appellant arrived home in a state of agitation she inquired of him what the issue was and he replied that his uncle Ezekiel had conned him and assaulted him. During cross-examination, Ezekiel (PW2) denied conning the appellant but confirmed slapping him for doing bad manners in the public. The appellant therefore knew that he had encountered PW2 who had slapped him. That cannot be said to be a person who was so drunk to the extent that he could not account for his actions. Our conclusion, like that of the High Court, is that the appellant had malice aforethought. The prosecution proved all the elements of the offence hence the appeal against conviction is without merit.

22. With regard to the sentence, the appellant's case is that the death penalty was unjustified in the circumstances of this case. His counsel also urged that the actions of PW1 should have been taken into account in passing the sentence. Further, that the trial Judge misdirected herself on the principles of sentencing. On the other hand, the respondent maintains that the death penalty was merited in the circumstances of this case and ought not to be disturbed.

23. As was stated in Bernard Kimani Gacheru v. Republic [2002] eKLR, ordinarily, sentencing is at the discretion of the trial court and an appellate court ought not to interfere with the sentence "unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle." In this case, the learned Judge cannot be faulted for overlooking some material factors, or taking into account irrelevant factors, or acting on wrong principles. That therefore leaves us with the question as to whether the sentence was manifestly excessive in the circumstances of the case. In addressing the issue, we will once again fall back on the counsel in Bernard Kimani Gacheru (supra) that "sentence is a matter that rests in the discretion of the trial court" and the appellate court should not easily interfere with it even "if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence." However, in the circumstances of this appeal, we are guided by

the holding of the Supreme Court in Francis Karioko Muruatetu & another v Republic [2017] KESC 2 (KLR) that section 204 of the Penal Code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder and that the death penalty should be applied as a discretionary maximum punishment. The death sentence being the ultimate sentence should, in our view, be reserved for those whose manner of committing murder can be described as atrocious, abominable, sickening, vile or repulsive. We do not think the circumstances of this case places the appellant in that category. Much as we have rejected the appellant's defence of intoxication, the fact remains that he was drunk. It is appreciated that alcohol when taken in excess impairs the thought process to some extent.

24. In Francis Karioko Muruatetu & another (supra), the Supreme Court highlighted the mitigating factors to be considered in passing sentence as follows:

> "(a) age of the offender;
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> b. being a first offender;
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> c. whether the offender pleaded guilty;
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> d. character and record of the offender;
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> e. commission of the offence in response to gender- based violence;
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> f. remorsefulness of the offender;
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> g. the possibility of reform and social re- adaptation of the offender;
>
> h. any other factor that the Court considers relevant."

25. In the case at hand, the mitigating factors are that the appellant was drunk and was a first offender. He also indicated remorse. On the other hand, the appellant disregarded the pleas by his own wife (PW1) to spare the child's life. The appellant misdirected his anger against Ezekiel (PW2) to a defenceless child who was oblivious to the happenings in the adult world. His failure to control his emotions as a result of alcohol consumption calls for a long period of incarceration so that he can reflect upon his life, and hopefully turn it around. In the circumstances, a sentence of 30 years imprisonment will be sufficient retribution for the appellant's wrong.

26. The upshot of the foregoing is that the appeal against conviction is found to be without merit and is dismissed. The appeal against sentence partially succeeds with the consequence that the death sentence is set aside and substituted with a prison sentence of 30 years. As expected, the prison authorities shall be guided by the proviso to section 333(2) of the Criminal Procedure Code in computing the period to be served by the appellant.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF JULY, 2024

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR