



**Litunya v Republic (Criminal Appeal 128 of 2018)
[2024] KECA 1121 (KLR) (30 August 2024) (Judgment)**

Neutral citation: [2024] KECA 1121 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 128 OF 2018
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
AUGUST 30, 2024**

BETWEEN

DOUGLAS MUSA LITUNYA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Siaya (Makau, J.) on 9th February 2017 in HCCRC No. 40 of 2014 & HCCRC No. 50 of 2015)

JUDGMENT

1. Douglas Musa Litunya (the appellant herein) was charged before the High Court, with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on 21st June 2011 at Kaindakwa Estate, Siaya Township Location in Siaya Sub County within Siaya County, he murdered William Omukunda Odongo. The appellant was tried and convicted of the offence and sentenced to death. Being dissatisfied and aggrieved with both the conviction and sentence, the appellant has now appealed to this Court.
2. This being a first appeal, we are mindful of our duty as 1st appellate court which was well articulated in *Erick Otieno Arum vs. Republic* [2006] eKLR as follows:

“It is now well settled, that a trial court has the duty to carefully examine and analyze the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e.) a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of



seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same.”

3. The prosecution’s case as presented before the trial court, is that the deceased and five others who included Daniel Wafune Oduor, PW2 and Fredrick Akhanda Ohindo, PW3 were at their house in Siaya town, rented by their boss, Wycliffe Ogong’a, At around 8.00pm while PW2, and 5 others including the deceased were in their room preparing supper, the appellant, Douglas knocked at the door; entered the room and called the deceased outside. The deceased went out leaving the door open. The pair talked for 5 minutes then PW2 & PW3 heard them struggle as they pushed each other into the room; and the deceased fell on the mattress on the floor. A lantern lamp inside the room enabled them to see what was happening.
4. PW2 noted that the deceased was bleeding, from the head; and holding on to his abdomen, from which the intestines were protruding. PW2 rushed to fetch his boss from a nearby pub, and upon return they found the deceased already dead. The police were called and took the body to the mortuary. After investigation the appellant was charged with the offence.
5. In his unsworn statement, the appellant denied the offence, and raised an alibi defence, stating that at the close of his business on the material day, he went home prepared a meal, ate then slept. At 1.00am he heard a knock on the door, and found police officers who told him they were looking for him; he was arrested, taken to the police station where he was told he had killed someone; and subsequently charged with an offence he knew nothing of.
6. The trial Judge framed the issue for determination as being:
 - whether the ingredients constituting a charge of murder had been proved;
 - whether the deceased was fatally injured by the appellant and if so,
 - whether the appellant acted with malice aforethought.
7. The trial court found that from the evidence of PW1 - PW5, there was no dispute about the death, as this was confirmed by the witnesses who saw the appellant and the deceased engaging in a physical encounter, and also saw the head and abdominal injuries; then returned to find the deceased lying dead at the scene, as well as the evidence of PW1, who identified his body to the doctor before post mortem; and of course the corroborative evidence of Dr. Metho, PW4, who testified on behalf of Dr. Biko, that the deceased had a 6cm cut wound on the parietal aspect of the head, penetrating abdominal injury, entry wound on the right hypochondrial region wound approximately 4cm with intestines spilling out of the abdominal wound, several wounds mainly in the small gut with leakage of intestinal contents onto the peritoneal cavity. The cause of death was due to a penetrating abdominal injury with damage to the small gut.
8. As to who caused the death, the trial court took into consideration the appellant’s alibi defence, and weighed it against the evidence of PW2 and PW3 which placed the appellant at the scene. The learned judge observed that PW2 and PW3 were able to see and identify the appellant, who served them meals for a period of over a week, as a worker at Equator Hotel in Siaya. The court was thus satisfied that on the material night there was sufficient light from the lantern to enable PW2 & 3 recognize the accused. The alibi defence was thus rejected as unsustainable and an afterthought, having been raised for the first time in his defence.
9. On malice aforethought the court recounted PW2 & PW3’s evidence that the appellant knocked at their door and called the deceased outside, where they heard them talking and then a struggle ensued, and thereafter the deceased fell on the mattress bleeding from his head and his intestines out. From the



evidence the court found that the appellant had planned to commit the murder and that the accused had knowledge that his act of stabbing the deceased would cause death or grievous harm.

10. Having considered all the evidence in its totality, the trial court found the appellant guilty of the offence as charged and sentenced him to death.
11. The appellant has raised 4 grounds in the memorandum of appeal, that: the learned trial judge erred by relying on the testimonies of PW2 and PW3 which were marred with contradictions and inconsistencies that rendered the prosecution evidence unsafe to base conviction upon; the learned trial judge erred in failing to fully appreciate the facts of the case, thus drawing inferences and reaching conclusions that are not supported by evidence; the trial judge failed to appreciate the appellant's mitigation; and the learned trial judge imposed an excessively harsh and unconstitutional sentence. He thus urges us to allow his appeal; quash the sentence that was imposed upon him; and/or vary the sentence by imposing a reduced jail term.
12. The appellant concedes that there was a death and the cause of said death as stated by the Doctor, but the contention is whether the appellant's actions or omissions caused the death and whether the appellant had malice aforethought. The appellant submits that the prosecution failed to prove its case beyond reasonable doubt, especially with regard to establishing that he had malice aforethought.
13. The appellant argues that PW2 & PW3 gave conflicting accounts of the happenings on the night in question with regard to how the deceased ended up falling on the mattress, in that PW2 claimed that the deceased fell onto the mattress that was on the floor after the appellant and the deceased got into an argument and started struggling and pushing each other inside the house; and that the deceased was holding his stomach at this point when he noticed that his intestines were sticking out of his stomach and his head was bleeding. That, prior to this altercation, PW2 did not mention hearing any screams coming from the deceased, he only heard them arguing; yet PW3 on the other hand, claimed to have heard the deceased screaming while the dueling pair were outside.
14. The appellant submits that there is also inconsistency as to how the deceased entered into the house, as PW2 claimed that the deceased entered into the house alone, whereas PW3 claimed that he got in with the appellant. We are urged to resolve the contradictions in favour of the appellant, drawing from the case of *Richard Munene vs. Republic* [2018] eKLR, which stated that contradiction or inconsistency in the evidence of the prosecution witness go to discredit that witness as being unreliable; and that where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused person.
15. The respondent on the other hand submits that the prosecution witnesses were consistent in their recalling of the events that took place leading to the death of the deceased; and even if other witnesses were to be called, there would be minor contradictions that would not shake the substance of the prosecution case. To buttress this position, the respondent seeks refuge in the case of *Joseph Maina Mwangi vs. Republic* Criminal Appeal No. 73 of 1993 (Tunoi, Lakha and Bosire JJA), where the learned judges stated:

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences.”
16. We have considered this argument, but our view is that these discrepancies are not substantial as it is a fact that the appellant knocked at the door, called out the deceased where they had an argument, a



- scuffle ensued and the deceased fell on the floor on the mattress. Indeed, the scuffle is the reason why the deceased was able to make it that far; not ruling out the flight or fright response to dangerous situations.
17. The appellant also submits that the prosecution failed to demonstrate that the appellant's action caused the death; that the testimonies of both PW2 and PW3, only revealed that the appellant had merely called the deceased to the door to have a conversation; and there was no evidence indicating that the appellant displayed aggression or appeared upset upon entering the house to call the deceased. It is thus argued, that the subsequent disagreement or argument between the pair cannot be considered evidence of malice on the part of the appellant.
 18. In this regard, the respondent submits that the evidence provided by PW2 and PW3 clearly placed the appellant at the scene and also saw the appellant inflicting an injury upon the deceased; the witnesses also stated that there was enough light for them to clearly identify the appellant who was not a stranger to them as they knew him to be an employee at a nearby hotel (Equator Hotel). The court was satisfied that the accused was properly identified and/or recognized by the lantern lamp light and he was also a co-worker of PW2, and PW3, and further that the prosecution witnesses placed the accused at the scene. It is this Court's view that the trial court was correct in finding the fact the accused went to the deceased's house, called him outside, proceeded to have an altercation with the deceased after which the deceased appeared with injuries.
 19. It is further argued that evidence presented suggested a lack of premeditation or deliberate intent on the part of the appellant; that there was no evidence alluding to any prior enmity, motive, or ill will between the appellant and the deceased, which could have contributed to the presence of malice aforethought. That in any event, the circumstances surrounding the incident, as described by the prosecution witnesses, did not support a conclusion of deliberate intent to cause harm or death.
 20. In this regard, the respondent submits that malice aforethought was established from the appellant's conduct - he went to the deceased's place of residence, called him out, and proceeded to inflict the fatal injury leading to his ultimate demise; the part of the body targeted and the nature and extent of injury occasioned which ultimately led to the demise of the deceased as opined by the Doctor who conducted the post mortem and concluded the cause of death as "abdominal injury with damage to small gut";
 21. We have considered the arguments presented on this limb; and we pose the question, how then would one explain that after the argument and scuffle, the deceased had the injuries, and the only interaction he had was with the appellant? We are of the considered view that the trial court was correct in drawing the conclusion that the appellant went to the deceased's house, called him outside, proceeded to have an altercation with the deceased after which the deceased appeared with injuries; and the circumstances and chain of events clearly pointed to the appellant as the culprit.
 22. In *Omar vs. Republic* (2010) 2KLR 19 at page 29, this Court stated:

"So by the appellant hitting the deceased on the neck with a bottle, he must have intended to cause her at least grievous harm. Indeed, the blow using a bottle caused a fatal wound on the deceased. The evidence clearly shows the appellant had the necessary malice aforethought."
 23. We adopt the same line of reasoning as in the *Omar* case (*supra*), taking note that the appellant argued with the deceased, had an altercation with the deceased; after which the deceased appeared with injuries.
 24. The appellant also submits that the knife found at the appellant's house during the arrest was not sufficient evidence of guilt as the said knife was not sent to the government chemist for testing. To this, the respondent argues that a murder weapon need not be produced and the same will not be fatal to the prosecution's case. In support of this proposition reference is made to the case of *Ekai vs. Republic*



(1981) KLR 569, where this Court rejected the argument that failure to produce the murder weapon is in itself fatal to a conviction. In that case the court found that even though the murder weapon had not been produced, the post mortem examination had established beyond all reasonable doubt that the fatal injury had been caused by a sharp weapon. We are also referred to Karani vs. Republic (2010)1 KLR 73 at page 79 & Ramdahan Kombe vs. Republic CR.A No. 168 of 2002 - MSA. We are in agreement that the failure to produce a murder weapon does not render the conviction unsafe, the evidence sufficiently demonstrated that the fatal injury was inflicted using a sharp object – consistent with what the prosecution witnesses said was used in the attack.

25. The appellant at the hearing concentrated his appeal on sentencing, drawing from the decision in Francis Karioko Muruatetu Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR, where the court expressed the view that:

“Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.”

26. It is on account of the foregoing, that the appellant argues that the imposition of the death penalty is excessively severe, surpassing what is justified, given the circumstances of this case, and taking into consideration the appellant’s mitigating factors. We are therefore urged to find fault with the sentence meted out by the trial court and first appellate court, drawing from the Francis Muruatetu case (supra) where the court held:

“Consequently, we find 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.”

27. The respondent submits that Muruatetu case as relied upon does not apply for reason that in this case the learned judge did not mete out the sentence of death against the appellant due to its mandatory nature. That the learned judge duly exercised his discretion whereby the appellant was given a chance to mitigate after which his mitigation was duly considered, but the court could not ignore the most cruel manner in which the deceased met his death; and the appellant was deserving of the mandatory sentence provided by law.

28. Nonetheless, the respondent submits that in the event that this Court agrees with the appellant and makes a decision to consider resentencing, then; Francis Karioko Muruatetu & Another vs. R [2017 eKLR] should be applied in re- sentencing. In that case, the Court held that:

“The Mandatory nature of the death sentence as provided for under section 204 of the Penal code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.”

29. Picking from the guidelines given by the Supreme Court in relation to sentencing, the respondent points out that the appellant has not even attempted to inform the court with sufficient reasons and documentation as to his ability to benefit from a reduction of sentence. We are thus urged to make a finding that the appellant was rightfully convicted for the offense of Murder contrary to section 203



- and if the court deems it fit to resentence the appellant then he be sentenced to at least forty (40) years, as Justice must not only be done but it must be seen to be done.
30. This Court also notes that the respondent conceded to the setting aside of the death sentence imposed. With regard to the severity of sentence, Section 379 (1)(a) & (b) of the Criminal Procedure Code provides for this court’s jurisdiction to entertain an appeal against sentence from the High Court sitting as the trial court where the sentence is fixed by law.
31. In *Francis Muruatetu & Another vs. Republic*, the Supreme Court of Kenya Petition No. 15 & 16 of 2016, the court gave sentencing guidelines with regard to mitigation before sentencing in murder cases at paragraph 71 as;
- a. Age of the offender,
 - b. Being a first offender,
 - c. Whether the offender pleaded guilty,
 - d. Character and record of the offender,
 - e. Commission of the offence in response to gender- based violence,
 - f. Remorsefulness of the offender,
 - g. Any other relevant factor.
32. In the same case the Court in regard to the application of mitigation by the accused before sentencing held as follows:
- “It is during mitigation, after conviction and before sentencing, that the offender’s version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or in the converse impose the death penalty.”
33. We take note that during mitigation the appellant stated that he was a first offender, he was remorseful and that his father is dependent on him and prayed for leniency.
34. In *Chai vs. Republic (Criminal Appeal 30 of 2020)* [2022]KECA 495 (KLR) (1 APRIL 2022) this Court, differently constituted held that the two holdings of the Supreme Court in the Muruatetu case made it very clear, and underscored the importance of receiving and considering mitigating circumstances, and also of applying applicable sentencing guidelines, even though the latter are a guide.
35. In his ruling on sentence, the learned judge while taking note of the mitigation, observed that the appellant was a young man, filled with remorse, but pointed out that the offence was serious and only provided for one sentence, to justify the death sentence. It is apparent that the learned judge found no room to exercise his discretion despite acknowledging the plea in mitigation.
36. We acknowledge that murder is a serious offence; and also consider the circumstances in which the offence was committed. It is not lost on us that the homicide was a result of a vicious and brutal attack involving a knife which the appellant had armed himself with. It is also clear that the attack was committed after some level of planning, where the appellant left his residence, tricked the deceased into coming out for a chat with him, he was already armed; and in our view it involved some considered level of planning; it was not a spontaneous explosion of blind rage; and we are in agreement with the trial judge that the appellant knew exactly what he wanted to do; and he accomplished his mission.



Consequently, we find that the appellant’s conviction for the offence of murder was safe and we uphold the said conviction.

37. We however take note that at the time of sentencing, death was considered as the only possible sentence for the offence of murder, so that despite considering the appellant’s plea in mitigation, he was not able to exercise his discretion judiciously. We are keenly aware of our emerging jurisprudence, courtesy of *Muruatetu* case (*supra*), that it is no longer the case that death is the mandatory sentence for murder. The respondent urges us that even as we review the sentence, that we impose a stiff sentence given the aggravating circumstances in this case; and guided by the principles set out by the Supreme Court in *Muruatetu* (*supra*). We are persuaded that in these circumstances, the appellant deserves to not only realise the gravity of his actions, and be kept away from the community for a long time; and in our considered view a life sentence is appropriate. We thus set aside the death sentence and substitute it with a life sentence.

38. As regards the indeterminate nature of a life sentence, we addressed ourselves in great detail in the case of *Evans Nyamari Ayako vs. R Kisumu Cr.A No 22 of 2018* that:

“... we are in agreement that an indeterminate life sentence falls afoul the provisions of Articles 27 and 28 of our Constitution purposively interpreted. We also find that there is an emerging consensus that the evolving standards of human decency and human rights to which Kenya has agreed to adhere to by virtue of Articles 2(5) and 2(6) of *the Constitution* that indeterminate life imprisonment is a cruel and degrading punishment which violates our constitutional values. Our conclusion is based on the consistent trend in many states towards abolition of life imprisonment or its re-definition to a term sentence...

This emerging consensus of the civilized world community, while not controlling our outcome, provides respected and significant confirmation for our own conclusion that life imprisonment is cruel and degrading treatment owing to its indefiniteness. On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years’ imprisonment.”

The upshot is that all factors considered in this case, a sentence of thirty (30) years imprisonment is warranted. We, therefore set aside the death sentence imposed by the High Court; and substitute thereto a prison term of thirty (30) years. We allow the appeal against the sentence, set aside the death sentence and substitute the same with a sentence of 30 years from the date of the appellant’s conviction by the High Court.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF AUGUST, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar

