



**Lusiti v Republic (Criminal Appeal 310 of 2018)
[2024] KECA 1123 (KLR) (30 August 2024) (Judgment)**

Neutral citation: [2024] KECA 1123 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 310 OF 2018
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
AUGUST 30, 2024**

BETWEEN

PAUL KIVISI LUSITI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment of the High Court of Kenya at
Bungoma (J.K. Serгон, J.) dated 30th January, 2006 in HCCR No. 3 of 1997)*

JUDGMENT

1. The appellant, Paul Kivisi Lusiti, was charged, convicted, and sentenced to death for the offence of murder of Julius Muchoki contrary to Section 203 as read with Section 204 of the Penal Code. As per the charge sheet, the incident occurred on 9th October 1996 at Malakisi Police Station.
2. Dissatisfied with the outcome, the appellant appeals on both conviction and sentence faulting the learned judge for:
 - i. Failing to note that the offence of murder was not established.
 - ii. Failing to note that the material evidence with regard to the ballistics opinion, which would have exonerated the appellant from the offence was deliberately withheld or suppressed by the prosecution
 - iii. Rejecting the appellant's defence of alibi.The appellant thus urged us to allow the appeal, and set him at liberty.
3. The evidence presented at the trial was that, Gladys Nabalayo PW3, George Wekesa Bwire, PW4 and Patrick Nzioki (Patrick), PW10, who shared a house within Malakisi Police Lines together with the appellant and his wife Florence, saw the appellant arrive from Bungoma on the night of 9th October,



- 1996, at about 7.30 pm. Florence informed the appellant that Sergeant Julius Muchoki, the deceased herein, had visited the residence to inquire why he had not reported on duty to man a nearby roadblock.
4. This information threw the appellant into a fit of rage, and he insulted and slapped Florence, tore her clothes, and threw a radio she had in her hands, onto the ground. So bad was the rage, that the appellant cocked his gun and threatened to shoot other relatives of his wife who were in the room. They scampered for safety to Patrick's room. When Patrick asked what was wrong, the appellant said he wanted to kill his wife. Patrick managed to cool down the appellant, advised him to remove the bullets from the gun's counter, and proceed to his duties. The appellant took his G3 rifle and cocked it, as he headed for the Report Office at Malakisi Police Station, while threatening that he would kill somebody that night. Soon thereafter, sounds of gunshots were heard near the report office, shortly after the appellant left for that direction.
 5. PW1, John Akatu (John) while attending to a call in the radio room, heard gunshots and screams; and shortly, he saw Sergeant Julius Muchoki, (deceased) fall down before reaching the Report Office, while being closely followed by the appellant. John saw the appellant pumping several bullets at the deceased and shooting indiscriminately at the radio room and as a result, the deceased got injured at the legs, pelvis, shoulder, abdomen and at the right hand, his G3 rifle also got shattered in the process. John witnessed all this with the assistance of electric lights inside and outside the report office.
 6. Eventually, the appellant headed back to his residence, where Patrick, having heard the gun shots, sat, armed on the alert. He saw the appellant approaching, while aiming at him. A struggle ensued between them, with several bullets fired by the appellant, but they did not get his real or imagined target. Eventually Patrick managed to wrestle down the appellant, disarmed him of the G3 rifle with the assistance of one George and managed to arrest the appellant thereby thwarting his attempt to flee from the premises of Malakisi Police Station.
 7. A postmortem conducted by Dr. Protus Wangila Simiyu, PW6, on the body of the deceased revealed that the deceased died as a result of cardiopulmonary arrest due to massive hemorrhage following a head injury due to multiple gunshots.
 8. Placed on his defence, the appellant elected to give an unsworn statement in which he denied being at the scene of the crime when the offence was committed as he had gone to visit his sick sister who was admitted at Kakamega Provincial Hospital in the morning of 9th October 1996. He reported on duty at 8.05 pm only to find people in groups discussing. He was intercepted and assaulted by Patrick while on his way to the report office. He claimed to have been a very close friend of the late Sergeant Julius Muchoki, and this made so many officers jealous of him; that Patrick was bitter because Sergeant Julius Muchoki shifted him from his quarters to pave way for other officers who were participating in a shooting competition within Malakisi Police Station; and the case against him was a frame up fueled by jealousy.
 9. By a judgment delivered on 30th January, 2006, the trial court found the appellant guilty and convicted him of the offence of murder. The appellant was sentenced to death.
 10. In support of the appeal, it is submitted that the testimony by PC Fange Ali, PW9, created doubt as to the identity, of the person who had the offending firearm, as he stated that he did not know whether the appellant had a gun. The appellant also placed a stain on the movement register that was relied on by the prosecution, since PW9 stated that one could not hold a gun for more than 20 days; the appellant had explained that during the same period he had no gun for more than two days, and whenever an officer took a gun, it was the custom that upon return, the movement of the guns would be recorded in the register; and that this reinforced the appellant's testimony that a gun was always returned for safety purposes, particularly in circumstances where a house.



11. The appellant places doubt on two arguments raised by the prosecution namely that at the time of the incident, there was no operation which could have enabled the officer to hold guns for more than the prescribed days; hence the argument by PW10 that there was an operation was not true. Secondly, that the appellant returned his gun before he left to attend to his sick sister, thus he had no gun when the shooting took place.
12. It is the appellant's contention that it would have been appropriate to bring such material witnesses as the officer who was in charge of the armoury and arms movement register to testify rather than bringing witness that were less material before the court; and that the failure by the prosecution to bring key witness and the failure to bring a forensic expert punched holes to the prosecution's case, hence the conviction and sentence of the appellant ought to be set aside, varied or reviewed.
13. The appellant also argues that there was no scientific analysis or ballistic report filed to support the alleged murder; and that the trial court erroneously relied on the testimony of PW7, regarding the alleged recovery of 23 spent cartridges from the scene of the crime, to hold the appellant guilty.
14. It is further argued by the appellant that there were multiple fire arms used at the scene, as the evidence of PW3 was that the shooting started at around 7.30 pm; went for 10 -15 minutes and that PW3 could not tell whether the gunshot at the police lines and the ones from the report office came from one gun, thus raising reasonable doubts as to the culpability of the appellant.
15. The appellant also faulted the trial court for erroneously rejecting the alibi defence, arguing that the learned judge ought to have treated the evidence of P.C Nzioki with circumspection, as the appellant had stated they were not in good terms; and it is the responsibility of the prosecution to disprove the defence of alibi. In support of this proposition, we are referred to *Charles Anjare Mwamusi v. R, CRA No. 226 of 2002*, where this Court stated:

“An alibi raises a specific defense and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”
16. It is also pointed out that the appellant was sentenced to suffer death on 30th January, 2006 when the mandatory sentence still stood, that with the advent of the Supreme Court decision in Francis Karioko Muruatetu and Anor' vs. Republic, Petition No. 15 & 16 of 2015 (consolidated [2017] eKLR, (referred to as Muruatetu 1) and Francis Karioko Muruatetu & Another vs. Republic; Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR (referred to as Muruatetu 2), sentencing is recognized as an exercise of judicial discretion; and when imposing a sentence, the mitigation by the accused person ought to be considered.
17. In opposing the appeal, the respondent contends that the prosecution proved their case to the required standard, and that the death of the deceased was not in dispute.
18. As to who caused the death, the respondent points out that PW5, PC Ochanda, testified that he was in the report office together with PW1 and the deceased; then just as he was leaving the report office within the station, he heard gun shots coming from the direction of the police lines, he ran and took cover behind the cells, even as more gunshots rent the air, followed by a scream from the report office; he later proceeded to the house of Inspector Aliwa, PW7 the Officer Commanding the Station; and reported what had transpired.
19. The respondent further contends that PW3 was directed to go and disarm the person who was shooting, and he obliged, even as more gunshots pierced the air, leading to PW3 taking cover by lying



on the ground for about 10 minutes; he then heard his colleagues walking towards the station and one of them saying that major, Sergeant Muchoki had been shot dead. PW3 left his cover and went to the station, where he found the office full of blood with Sergeant Muchoki lying in a pool of blood with several bullet wounds; and an injured PC John screaming in the radio room. PC John was rushed to Lumboka hospital; and PW3 found the appellant at the station, under arrest by his other colleagues, who tied him up with a rope, before placing him in the cells.

20. The respondent points out that PW3 confirmed that:

There are lights in the radio room and report office as well as outside the report office by(sic) security lights behind and in front of the station. It is from normal electricity. There is a counter in the report office in front of the door”.

21. The respondent argues that PC John saw the appellant shooting the deceased. After firing at the deceased many times, the appellant went where PC John was hiding and fired at him. This evidence was corroborated by PW5, PW6, and PW7, SP. Walter Aliwa, who saw the body of the deceased and the injuries sustained.

22. Regarding malice aforethought, the respondent argues that it was proved as the injuries inflicted by the appellant caused the death of the deceased; that there was sufficient evidence that the appellant acted with malice aforethought as the appellant had the intention to cause death or to do grievous harm to the deceased; and that the appellant was well aware of his actions and intended the consequences of the said acts. The respondent relied on the case of *Ali Salim Bahati & Another vs. Republic* [2019] eKLR in which this Court was of the view that, a vicious attack on the deceased was also a clear indication of the intended consequences of an offender’s action, that is, the death of the deceased; and also established malice aforethought on the part of the appellants.

23. With regard to the failure to produce a ballistic report, the respondent contends that the trial court agreed with the prosecution that the appellant was the one in possession of the firearm that caused the death of the deceased; that it was proved that the appellant was given G3 rifle No. A3 6926995 with forty (40) rounds of ammunition on 14th September 1996 and assigned duties of manning a roadblock; that the arms movement register further showed that the same gun was handed over to DCIO Bungoma on 10th October, 1996 and 23 spent cartridges were recovered from the scene.

24. In dismissing the appellant's alibi defence, the learned judge termed it a made-up story that was uncorroborated. On sentence, the respondent concedes to setting aside the mandatory death sentence and submits that a term sentence be imposed.

25. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a first appeal, this Court is mindful of its duty as 1st appellate Court as was well articulated by this Court 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 demeanor and so the first appellate court would give allowance for the same.”



26. For the prosecution to secure a conviction on the charge of murder, it has to prove 3 ingredients against the accused person.

In the case of Anthony Ndegwa Ngari vs. Republic [2014] eKLR the elements of the offence of murder were listed as follows:

- a. the death of the deceased occurred,
 - b. that the accused committed the unlawful act which caused the death of the deceased,
 - c. that the accused had malice aforethought.
27. The death of the deceased has been proved by all the prosecution witnesses who saw the body of the deceased and the injuries thereon including PW5, 6 & 7. PW6 performed the post mortem and confirmed that the cause of death was as a result of cardiopulmonary arrest due to massive hemorrhage following a head injury due to multiple gunshots. He produced the report as Ex.2.
28. Could the deceased's death be attributed to the appellant's actions? Was there proof that the appellant committed the unlawful act which caused the death of the deceased? As to who caused the death, PC John (PW2) stated in his evidence that he saw the appellant shooting the deceased. Next, the prosecution needed to adduce evidence to establish that the appellant had malice aforethought when he committed the act which caused the death.
29. The ingredients of murder were explained in the case of Roba Galma Wario vs. Republic [2015] eKLR, where the court held that:

“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 required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean that the death of the deceased during the brawl was not intentional.”

30. Malice aforethought has been defined by the Court of Appeal in several cases, in Nzuki vs. Republic [1993] KLR 171, the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the accused. intention to cause death, intention to cause grievous bodily harm, where the accused knows that there is risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.

31. PC John's evidence on cross examination in reference to the appellant was that:

“As he shot, he said in Swahili "nitamaliza nyinyi" I included it in my statement. I forgot to say so in the main evidence today. It is not true that it is not the accused who shot at me. The accused is the one who shot the deceased and shot at him(sic). I saw him with the help of the light at the report office and I saw him with my own eyes”.

Taking into consideration the testimonies of PW5, 6 and PW7; the use of his G3 rifle to repeatedly pump several bullets into the deceased, is proof that there was intention to cause death or intention to cause grievous harm and that the appellant knew there is risk of death or grievous bodily harm.

32. As regards scientific analysis of ballistics examination, we take note that the learned judge in his judgment was persuaded by the evidence of PW10 that the gun was recovered from the appellant, as corroborated by the entry in the Malakisi Arms Movement Register which showed that the said firearm



- SN 3692699 with 40 rounds of ammunition was issued to the appellant. Further, that there was no evidence that the appellant surrendered the firearm earlier than 9th October 1996;
33. The learned judge also considered the evidence that PW7 who took possession of the gun, had also recovered 23 spent cartridges from the scene; and that although the firearm was not subjected to ballistics examination; the appellant in his defence did not deny being in possession of the gun; or how it came into the possession of PW7; nor the subsequent handing over to DCIO Bungoma.
 34. We indeed further note that the appellant did not produce any evidence to show that he had surrendered the gun prior to the incident. We find that there was no evidence to suggest that another firearm was used to shoot, nor was there any explanation given as to why from the one magazine issued with 20 bullets, only eight were found intact after the shooting. We concur with the learned judge that despite the lack of a ballistics report, the chain of evidence was so well connected as to link only the appellant to the shooting, to the exclusion of any other reasonable hypothesis.
 35. With regard to the alibi defence, the learned judge in his judgment considered it to be a made up story incapable of being believed. On our part, we find that alibi defence did not destabilize the evidence of the prosecution which put him at the scene of crime, as confirmed by PW1, and PW10; and that he left his residence in an agitated mood, spiked by the fact that the deceased had gone to look for him as he had not reported on duty.
 36. We detect no error on the part of the learned judge, either in assessing the facts, or in applying the law and the legal principles, leading to the conclusion that the prosecution proved their case against the appellant beyond reasonable doubt; and that the conviction was safe.
 37. With regard to the severity of sentence, Section 379 (1(a) and (b) of the Criminal Procedure Code provides for this Court's jurisdiction to entertain an appeal against sentence from the High Court. This Court notes that the respondent concedes to the reduction of the sentence that was imposed on the appellant from the mandatory sentence to a term sentence.
 38. 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 follows:
 - 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.
 39. 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.”

40. 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 I (supra) case makes it very clear and underscores the importance of receiving and considering mitigating circumstances, and also of applying applicable sentencing guidelines, even though the latter are a guide.
41. To justify a death sentence, the ruling should have spoken to it, showing in black and white what the court considered. In the absence of any demonstration of factors that could have led to such a sentence we find the same to be excessive. We nonetheless take note of the brutal manner in which the appellant executed his actions, pumping several bullets into the deceased, as though to confirm that he was totally dead, and this was an act committed by a member of the disciplined forces who should have known better, worse still acting in such a depraved manner against his superior, without any hint of provocation. We find these to be aggravating circumstances which at best ought to attract a long period of being kept away from the free society.
42. Consequently, we find that the appellant’s conviction for the offence of murder was safe and upholds the said conviction. We however, allow the appeal against the sentence and set aside the death sentence and substitute the same with a sentence of 30 years’ imprisonment. We recognize that the appellant was arrested immediately after committing the offence, and placed in cells on 9th October 1996; he remained in remand until January 2006 when he was sentenced. By dint of section 333(2) of the Criminal Procedure Code, we are bound to take into account this period spent in remand, in meting out the sentence. The result is that the 30 years’ sentence shall take effect from 9th October 1996, which was the date of arrest and incarceration. It is only to this very limited extent that the appeal on sentence succeeds.

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

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

