



REPUBLIC OF KENYA



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**Oduor v Republic (Criminal Appeal 139 of 2019)
[2024] KECA 1115 (KLR) (30 August 2024) (Judgment)**

Neutral citation: [2024] KECA 1115 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 139 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
AUGUST 30, 2024**

BETWEEN

ERICK ODUOR APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgement the High Court of Kenya at Siaya (J.A. Makau) dated 19th April 2018 in HCRA No. 30 of 2015)

JUDGMENT

1. Eric Oduor the appellant before us was tried and convicted by the High Court (J.A. Makau) at Siaya, of the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. He was sentenced to serve 45 years' imprisonment.
2. The particulars of the information upon which the appellant was tried, were that, on 6th November, 2014 at Kagilo Sub-location, Gem Sub County within Siaya County, jointly with others not before the Court, he murdered Callisto Agingo Okello (herein deceased).
3. During the trial 6 witnesses testified for the prosecution. These were Simon Okoth Obiero - the Assistant Chief of Kagilo Sub Location, Caroline Adhiambo Aginga (Caroline) - the wife to the deceased, Joseph Owuor Bala (Bala) - a resident of Kagilo, Paul Okumu Okello (Paul) also a resident of Kagilo, Inspector Charles Mokaya (IP Mokaya) then Deputy OCS Yala Police station who was the investigating officer and also arrested the appellant, and finally, Dr Biko Opidi, a medical officer at Siaya Referral Hospital who produced the post mortem report on behalf of Dr Collins Oginga who carried out the post mortem examination.
4. The prosecution evidence was that, on the material day the Assistant Chief had a meeting which was attended by many people. The purpose of the meeting was to discuss incidents of stock theft. The meeting became rowdy when one Christopher Noga whose livestock had been stolen mentioned the



deceased as a suspect. The deceased denied the allegation, but conceded having admitted the alleged infraction to one Odhiambo Noga. However, the deceased maintained that the admission was done in a drunken stupor and was actually not true that he had stolen the cattle. The appellant and two other persons then took the deceased outside tied up his hands and beat him using logs and branches of a tree, demanding to know where he had taken the cattle.

5. Bala and Paul who had attended the meeting both testified that they saw the deceased and one Otieno, being beaten by the appellant and two other men identified as Odhiambo and Omondi. The deceased and Otieno were then taken to the Administration Police at the DC's office where they found the Assistant chief who had gone to call for help from the Administration police officers based at the DC's office. The Assistant chief directed that the two be taken to the Hospital. On arrival at Yala Level IV Hospital the deceased was confirmed dead.
6. Caroline heard of her husband's plight from her sister in law. She proceeded to the main Road that is Wagai-Nyangweso Road, where she found the deceased with his hands tied with a nylon rope. She found the appellant and Odhiambo Noga beating up the deceased who was lying on the ground. She screamed and ran to the DC's office where she found the Assistant Chief. Subsequently, the deceased was brought to the DC's office by Boda Boda riders. According to Caroline the deceased was already dead but the police at the DC's office directed that he be taken to Hospital. When Caroline arrived at the Hospital, she found that the deceased had been declared dead so she went home.
7. Two days later, Caroline identified the body of the deceased to Dr Collins Oginga who performed a postmortem examination. The report of the examination was produced in evidence by Dr Biko Opidi. According to the postmortem report, the deceased had multiple bruises on both upper limbs. There was also blood collection in the lungs, spleen was torn, the right and left kidney ruptured, intra-abdominal bleeding, testicles and penis swollen, and the 1st and 2nd vertebrae of the spinal column were fractured. Dr Oginga formed the opinion that the cause of death was cardio respiratory failure, due to severe lung injury coupled with abdominal viscera rupture.
8. Inspector Charles Mokaya (IP Mokaya) who was the investigation officer opened an inquest file, but when the file was forwarded to the Office of the Director of Public Prosecutions (ODPP), he was directed to arrest the appellant, Odhiambo and Otieno, but he only managed to arrest the appellant and charged him with the offence.
9. In his defence the appellant gave a sworn statement in which he admitted having been present at the meeting called by the Assistant Chief. At the request of the Assistant Chief he escorted him to the police station as the meeting had become rowdy. The appellant stated that the deceased was being beaten by some people, but the Assistant chief cautioned them not to beat him. Later they came back from the station with two police officers and found the deceased lying on the road. The officers instructed that the deceased be taken to hospital, and since there was no vehicle available the appellant carried the deceased to the Hospital where they found his wife already there. They left the deceased at the hospital with his wife. About 5 months later he was arrested by Inspector Mokaya and charged with the offence of murder.
10. In his judgment the learned Judge of the High Court found that the appellant was placed at the scene of the incident by four eye witnesses, and that Caroline, Bala and Paul all testified that they saw the appellant assault the deceased. Further, that the evidence of IP Mokaya and Dr Opidi confirmed that the deceased's cause of death arose from injuries that he suffered from an assault, and therefore the death of the deceased and cause of death were proved. The learned Judge found malice aforethought established through the nature of injuries that were inflicted upon the deceased, as the injuries were



either intended to cause grievous harm or death to the deceased. The learned Judge therefore rejected the appellant's defence and convicted him of the charge.

11. In his memorandum of appeal filed through his advocate, Ochieng Bilha Erykah, the appellant faulted the learned judge for relying on conflicting and contradictory evidence; failing to find that the prosecution failed to call crucial and independent witnesses to prove their case; failing to appreciate that the prosecution did not prove the case beyond reasonable doubt; and failing to consider the mitigation raised by the appellant in sentencing him.
12. During the plenary hearing of the appeal, the appellant was represented by his counsel, while the respondent was represented by Mr. Onanda Antony of the ODPP. Both counsel relied on their written submissions.
13. In the written submissions, counsel for the appellant pointed out that Caroline admitted having lied to the police, and this rendered her entire testimony unreliable; Caroline also contradicted herself when she first stated that the deceased was taken to Hospital by boda boda riders and later said that it is the appellant who took him to Hospital; and that Caroline's statement to the police and her evidence in Court were completely different.
14. The appellant also submitted that there was contradiction as to how many people assaulted the deceased as the Assistant Chief stated it was the public, Caroline stated that they were only two people, Bala stated they were 3 people, whilst IP Mokaya stated it was a mob. There was also contradiction regarding the time the incident happened. The Court was, therefore, urged to find that the prosecution evidence was fabricated and unreliable.
15. Finally, counsel for the appellant submitted that the prosecution failed in its duty to call crucial witnesses. For instance, Otieno, who was also alleged to have been assaulted alongside the deceased was not called as a witness. The Court was urged to follow *Bukenya & others v Uganda* [1972] EA 549, and conclude that the witness was not called because his evidence would have been adverse to the prosecution case. Similarly, the appellant contended, the boda boda riders who took the deceased to hospital were also not called to testify.
16. In addition, it was submitted that the prosecution did not prove the case against the appellant beyond reasonable doubt, as the postmortem report that was produced in evidence was not adequate to prove that it is the deceased who caused the injuries, nor did the prosecution produce any murder weapon. Further, the Assistant Chief, Caroline and Bala did not immediately identify the appellant to the police as the person who caused the injuries to the deceased, and only reported the matter four days later. Finally, mens rea was not proved as there was no evidence of malice aforethought, nor was there any evidence as to why the appellant would have assaulted the deceased.
17. On sentence, the Court was urged to consider the mitigation that was raised by the appellant and reduce the sentence that was imposed upon him by the trial court. The Supreme Court decision in *Francis Karioko Muruatetu & Another - v- Republic*, Petition No. 15 of 2016, was cited, and the court urged to take into account that the appellant was a first offender, and had been in custody since his arrest in March, 2014. In addition, he was the sole breadwinner of his family and is remorseful.
18. In its written submissions filed through Mr. Onanda Antony, a Senior Principal Prosecution Counsel in the office of the ODPP, counsel submitted that the ingredients of the offence of murder, which are malice aforethought, cause of death, identification of the appellant and placing of the appellant at the scene, were all established. Counsel argued that malice aforethought was established through evidence regarding the circumstances of the offence, including the extent of the injuries suffered by the deceased such as severe lung injury coupled with abdominal visceral rupture that was caused by a blunt force.



Counsel added that there was evidence that the appellant in collusion with others tied up the deceased and inflicted grievous injuries on him, and that the postmortem report that was produced in evidence established the deceased's cause of death.

19. As regards the alleged contradictory and inconsistent evidence, counsel submitted that the prosecution witnesses were consistent in their evidence regarding what led to the death of the deceased. He argued that if there were any contradictions in the testimony of the witnesses, the same were very minor, and did not shake the substance of the prosecution case. He cited *Joseph Maina Mwangi - v- Republic*, Criminal Appeal No. 73 of 1993; where this Court 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.”

20. As regards sentence, Mr. Onanda submitted that the appellant was accorded a fair trial and that his mitigation was properly considered before the sentence was imposed. The Court was, therefore, urged to uphold the conviction and sentence.

21. We have carefully considered this appeal, the submissions made before us and the law. This being a first appeal, it is our duty to exhaustively reconsider and re-evaluate the evidence that was adduced in the trial court in light of the law, and draw our own conclusions in determining whether the judgment of the trial court should be upheld. In doing so, we bear in mind what this Court stated in *Kiilu & Another v. Republic* [2005]1 KLR 174:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

22. The appellant was charged with the offence of murder and it was incumbent upon the prosecution to prove the ingredients of the offence of murder. This required proof that the death of the deceased occurred;

that the death was caused by an act or omission on the part of the appellant; and that in committing the act or omission the appellant had malice aforethought. These are the matters that we shall inquire into in addressing the evidence that was before the trial court.

23. There is no dispute that the deceased died. This was clear from the evidence of the Assistant Chief, Caroline and Bala. It was also confirmed by the Dr. Collins Oginga who performed the postmortem examination. The postmortem examination also revealed that the deceased died as a result of injuries which included multiple bruises and injuries to the respiratory system, resulting in hemorrhagic lungs and hemorrthorax, torn spleen, ruptured left and right kidney with intra-abdominal bleeding resulting in cardio respiratory failure, as a result of the severe lung injury coupled with abdominal viscera rupture (kidney and spleen) and resultant hemorrhage.



24. The question is whether these injuries arose as a result of any act or omission on the part of the appellant. We note that there was talk of “mob justice” and that the police were initially reluctant to charge anyone, instead opting to open an inquest file. This was, however, countermanded by the ODPP who directed the appellant to be arrested and charged. The appellant did not deny being present at the meeting that was called by the Assistant Chief.
25. Going by the evidence of the Assistant Chief, Bala and Paul, the deceased landed in trouble when he was quoted as having boasted to his brother that he had taken part in the livestock theft which was subject of the discussion. Although the deceased claimed that the statement was not true, but was made as a result of a drunken stupor, the people who were in the meeting were not amused demanding to know from him who had stolen the livestock, and this caused a commotion.
26. According to Bala, it was the appellant, Odhiambo and Omondi who took the deceased outside the school compound, and started beating him demanding that he produces the livestock that had been stolen. The three beat the deceased for about twenty minutes using sticks from trees.
27. Paul also stated that the three, that is, Odhiambo, Omondi and the appellant, were outside, that they returned back to the meeting and while the prayers to close the meeting were being said, the appellant took the deceased and one Otieno outside, and tied their hands separately. The appellant was then joined by Odhiambo and Omondi and the three proceeded to beat the deceased and Otieno for about twenty minutes.
28. On his part, the Assistant Chief explained that he adjourned the meeting and remained behind talking to some members of the public, when he heard people quarrelling outside the school compound, demanding to be told who was the suspect. He decided to call the DC’s office for reinforcement but this took long; and that he heard screams and the public beating up the deceased although he did not go outside for fear. He decided to walk to the DC’s place to report the matter, and as they were walking out of the DC’s camp to go back to the scene, he saw some boda boda carrying the deceased and one Otieno, and the police ordered the boda boda to take the two to the hospital. On arrival at the hospital the deceased was declared dead.
29. The other material witness was Caroline, who upon learning of what was happening to the deceased, proceeded to the scene and found the deceased’s hands tied with a nylon rope. The appellant and Odhiambo were beating the deceased who was lying on the ground. Caroline ran to the DC’s office after the appellant threatened to beat her if she did not keep quiet. While at the DC’s office, her husband was brought; and then taken to Yala Level IV Hospital. She followed, but when she arrived at the hospital, she found that her husband had been confirmed dead.
30. While the evidence of these material witnesses is not exactly identical, it is clear that Bala and Paul both saw the appellant, Odhiambo and Omondi, beating up the deceased, and this was outside the Hall where the meeting was taking place. It is true that there was a crowd present, but it is the appellant and these other two people who beat up the deceased. Caroline was not present at the meeting, she saw her husband being beaten by the appellant and Odhiambo on the main road, just before he was taken to the DC’s office. She did not see Omondi beat her husband, because at that particular time Omondi was not there. Contrary to the appellant’s contention that there was contradiction regarding how many people assaulted the deceased, it is evident that Caroline, Bala and Paul all identified him as having been among three people who assaulted the deceased initially, and Caroline only later saw the appellant and Odhiambo assaulting the deceased
31. The Assistant Chief was not quite clear on the identity of the persons who assaulted the deceased, but the evidence was that he was inside the hall when the assault took place outside, and because of the



commotion outside, he may have genuinely believed that it was a mob that had attacked the deceased. As for Inspector Mokaya, he was not an eye-witness and only relied on information given to him. In our view, there was no material contradiction in the prosecution evidence regarding who assaulted the deceased.

32. The deceased suffered his injuries as a result of being assaulted by three people, and the appellant was positively identified by three eye witnesses as one of the persons who assaulted the deceased. The appellant's defence denying having participated in assaulting the deceased was, therefore, properly rejected. There was no evidence that any murder weapon was recovered, and it matters not that no murder weapon was produced. We, therefore, have no hesitation in coming to the conclusion that the deceased suffered the injuries that caused his death as a result of the actions of the appellant and the two other people.
33. The vicious nature of the attack is evident from the injuries that the deceased suffered. Under Section 206(a) of the *Penal Code*, malice aforethought can be inferred where there is intention to cause the death of, or to do grievous harm to any person, whether that person is the person actually killed or not. Through their action of severely beating up the deceased, the appellant and his two colleagues evinced a common intention of causing either grievous harm or death to the deceased. We, therefore, find that the appellant had malice aforethought. Consequently, we find that all the ingredients of the offence of murder were established, and the appellant was properly convicted as the charge against him was proved to the required standard. The trial Judge cannot be faulted in this regard.
34. On the sentence, under Section 204 of the *Penal Code* a person convicted of murder under Section 203 is liable to be sentenced to death. In *Bernard Kimani Gacheru v. Republic* [2002] eKLR, this Court stated:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with 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. Even if, the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”
35. In sentencing the appellant, the trial Judge considered the appellant's mitigation and sentenced him to serve forty-five years' imprisonment. The appellant has complained that the trial Judge failed to consider his mitigation. This is not correct as the record indicates that the trial Judge took into account the appellant's mitigation which included the fact that he was remorseful, was a first offender and a family man. The learned Judge exercised his discretion and did not give the appellant the death penalty, but instead imposed the prison term of forty-five years. In our view, the learned Judge properly exercised his discretion as the trial court, and we have no reason to interfere.
36. The upshot of the above is that we uphold the appellant's conviction and sentence, and dismiss the appeal in its entirety.

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

