Ali v Republic (Criminal Appeal 51 of 2021)
[2024] KECA 1168 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1168 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 51 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

SEPTEMBER 20, 2024

BETWEEN

ALI KAJOTO ALI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated 30th September 2021 in Malindi High Court Cr. Case No. 16 of 2015)

JUDGMENT

1. The appellant, Ali Kajoto Ali, was charged with the offence of murder contrary to section 203 and section 204 of the Penal Code. The particulars of the offence were that, on 26th October 2012, at Upendo village, he murdered Charo Kazungu Karisa Nguyo (the deceased). He pleaded not guilty and the case proceeded to trial where the prosecution called six (6) witnesses.

2. Ngumbao Kazungu, PW1, testified that on 26th October 2012, when the deceased, who was his younger brother, had taken the cows to the fields at the back of their homestead, the appellant emerged and started chasing him whilst armed with a pounding stick. The deceased ran from the cowshed towards their houses with the appellant in pursuit. As he chased him, he hit the deceased on the head with the stick. PW1 tried to intervene and stop the appellant, but he then went on to use a bow and an arrow to inflict harm on the deceased's stomach. PW1 stated that all efforts to stop the appellant from injuring the deceased were met with threats of violence from the appellant who, after inflicting the injuries on the deceased, walked away.

3. According to PW1, the deceased died on the spot after which they called the police. The deceased's body was later taken to the mortuary. He also stated that the appellant had alleged that the deceased was a wizard, and that a cleansing ceremony was conducted a year before the incident.

4. On cross-examination, he testified that he saw the appellant use a pounding stick, an arrow and a bow to inflict bodily harm on the deceased, and that he had died on the spot. He also confirmed that, prior to his death, there were accusations of witchcraft against the deceased, and that he had been previously attacked and injured on the road at night by the appellant on three occasions.

5. Sidi Katana, PW2, the wife to the deceased's brother, testified that, on 26th October 2012, the deceased brought some cows to graze within the compound. She saw the appellant chasing the deceased while armed with a stick, an arrow and a bow which he targeted at the deceased's head and stomach. She saw the appellant hit the deceased on the head three times with the piece of wood, and that he also shot him with the arrow on the stomach and that, due to the injuries, the deceased passed away immediately; that they tried to stop the appellant from attacking the deceased, but he threatened them and almost assaulted PW1, her husband.

6. Philip Kadenge, PW3, is a pastor and a businessman. He stated that, on 17th March 2015, he was part of a security meeting called to deliberate on several deaths that had occurred in Mulango village; that, during the meeting, it was alleged that the key suspect of the murders was the appellant and that, when he was called upon to defend himself, he had no defence to proffer, and that the matter was left in the hands of the Chief.

   Charo Kazungu, PW4, attended the same security meeting on 17th October 2015 and was called to deliberate on the killings within the village where the appellant was mentioned as a suspect. It was his further evidence that, on 15th March 2015, the appellant went to his kiosk and, while he talked with the

4. appellant, he revealed to him that he was responsible for the deaths in the area, and that he had also killed the deceased; that the appellant was well known for threatening people and that, during the meeting, he admitted the offences and pleaded for forgiveness and that, thereafter, the chief adjourned the meeting.

5. Tabu Karisa, PW5, the wife of the deceased, testified that, prior to his death, they were walking together from a burial ceremony when the appellant approached them and informed the deceased that he would be visiting them at their home. She became suspicious and decided to inform the Assistant Chief; that, before that matter could be resolved, the deceased was dead within two- three months.

6. PC Peter Odhiambo, PW6, was the investigating officer. He told the court that he was the lead investigating officer and the manner of the conduct of the investigations culminating in the arrest and indictment of the appellant.

7. When placed on his defence, the appellant denied any wrong doing or killing the deceased. He denied being at the scene or attacking the deceased.

8. Upon considering the evidence, the trial Judge convicted the appellant of the offence of murder and sentenced him to serve 30 years' imprisonment.

9. Aggrieved by the conviction and sentence, the appellant has filed an appeal to this Court on the grounds that malice aforethought was not established and that he was not identified as the perpetrator; that the trial court was in error in law and fact in failing to appreciate the requirements of section 111 of the *Evidence Act*; that crucial witnesses were not called; that the prosecution evidence was inconsistent and contradictory; and, finally, that sentence imposed on him was punitive, harsh and excessive.

10. Both the appellant and the respondent filed written submissions and, when the appeal came up for hearing on a virtual platform, learned counsel Ms. Aoko appeared for the appellant while learned prosecution counsel Ms. Kanyuira appeared for the State. Both counsels sought to rely on the written submissions in their entirety.

11. In his written submissions, the appellant submitted that malice aforethought was not proved; that the prosecution failed to call crucial witnesses which rendered the production of exhibit 2, the post-mortem report, of little or no probative value. It was further submitted that there were grave inconsistencies and contradictions in the prosecution witness evidence of PW1 and PW2 in the manner in which the appellant was alleged to have assaulted the deceased; that he was not properly identified as no identification parade was carried out and that the prosecution did not prove their case beyond any reasonable doubt.

12. It was submitted on behalf of the State that the prosecution established its case to the required standards; that the appellant was identified by PW1, who saw him inflict the injuries on the deceased; that , although an identification parade ought to have been conducted by the investigating officer since the appellant was not known to PW1 and PW2, counsel relied on the case of *Wamungau v Republic* [1989] KLR to argue that failure to conduct a parade did not vitiate the prosecution case, and did not prejudice the appellant in any way, who had ample time to test the truthful of the witnesses through cross- examination.

13. It was further submitted that the prosecution established malice aforethought through the evidence of the injuries the appellant inflicted on the deceased, the nature of the weapons used and the location where the injuries were inflicted.

14. On sentence, it was submitted that the trial Judge considered the appellant's mitigation and, relying upon the Supreme Court guidance in the case of Francis Karioko Muruatetu v Republic, the Judge properly sentenced him to 30 years' imprisonment.

15. This being a first appeal, the Court is required to submit the evidence as a whole to a fresh and exhaustive examination and reach its own independent decision on the evidence. The Court must itself weigh the conflicting evidence and draw its own conclusions. See *Kiilu & Another v Republic* [2005] 1 KLR.

    This duty was well articulated by this Court in *Erick Otieno Arum v Republic* [2006] eKLR that:

    > "It is now well settled, that a trial court has the duty to carefully examine and analyse 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"

16. Given the above, the issues for consideration are: i) Whether the offence of murder was proved; ii) Whether the appellant was responsible for the murder of the deceased; iii) Whether crucial witnesses were not called; iv) Whether the prosecution evidence was inconsistent and contradictory; Whether the sentence was punitive, harsh and excessive.

17. In the instant case, the appellant was convicted for the offence of murder. For the offence of murder to be established, the prosecution must prove three elements. First, the death of the deceased must be established; secondly, that the death of the deceased was caused by an unlawful act or omission by the accused person(s); and finally, that the accused persons committed the unlawful act or omission with malice aforethought. See *Roba Galma Wario v Republic* [2015] eKLR.

18. In the instant case, the fact of the deceased's death is not in dispute. All of the prosecution witnesses confirmed that, after he was assaulted by the appellant, the deceased died on the spot and his body taken to the mortuary where a postmortem was conducted. The post mortem revealed that the cause of death was due to severe head injury. Given this evidence, the fact of death was clearly established.

19. The fact of the deceased's death notwithstanding, the appellant has argued that the prosecution failed to call the witnesses that identified the body of the deceased during the postmortem examination; that on account of this omission, it was not possible to ascertain whether the body that was identified during the postmortem was that of the deceased; that this was fatal to the prosecution's case as it rendered the postmortem report of little or no probative value. We have considered the record and find that, when the postmortem report was produced by PW6, the Investigating officer, there was no objection to its production. The record does not also disclose that the issue now raised before this Court was raised during the hearing or determined by the trial court. The appellant having failed to raise it at the earliest opportunity, we decline to address it at this stage. This ground fails.

20. As to whether the appellant was identified as the person who killed the deceased, the appellant has challenged the evidence of his identification on the basis that the police did not carry out an identification parade to corroborate their evidence.

    In the case of *R v Turnbull*, [1976] 3 All ER 551, it was stated that:

> "... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

21. And in the case of *John Mwangi Kamau v Republic* [2014] eKLR this Court observed that identification parades are meant to test the correctness of a witness's identification of a suspect. It was noted that ideally, a witness ought to give the description of his or her assailant for purposes of organizing an identification parade.

22. In the case of *Andrea Nahashon Mwarisha v Republic* [2016] eKLR this Court stated the applicable principle thus:

> "Identification parades are necessary though not absolutely where the witness purports to identify a suspect did in extremely difficult conditions, say, where the offence is committed at night and when visibility may have been a challenge having regard to the availability or lack of light and when the circumstances under which the offence is committed are harrowing to the witness thereby impairing his ability to positively perceive and with certainty identify the culprit or where the incident lasts for a short time. The purpose of identification parade as explained in Kinyanjui & Others v Republic, [1989] KLR 60: "is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify and for a proper record to be made of that event to remove possible later confusion....." Further identification parades are meant to gauge and test the correctness of a witness's identification of a suspect given the circumstances under which he claims to have identified the suspect...

In this case, the offence was not committed in difficult circumstances at all. It was during the day and visibility was not poor. The complainant too spent some time with the appellant at the scene of crime.....

..... In those circumstances, of what evidential value would have been the identification parade? We cannot think of any. To our mind, it would have been superfluous. The identification parade would even have been hampered by want of earlier description by the complainant of any attributes of the appellant. Even if the complaint by the appellant was valid, we are still of the view that given the circumstances under which the identification was made, there was no room for mistaken identity "

23. When faced with similar circumstances regarding the purpose of an identification parade, this Court in the case of *Bernard Mutuku Munyao & another v Republic* [2008] eKLR stated:

> " The absence or presence of it goes to the weight to be placed on the available evidence and does not make such evidence inadmissible or of no probative value. One may think of circumstances where lack of an identification parade would seriously weaken the evidence of visual identification where there is a solitary witness or it is the only evidence available and the identification was made in difficult circumstances. We have no reason to doubt the findings of the two courts below that the two witnesses positively identified the two appellants at the scene in circumstances that were conducive to such identification."

24. PW 1 and PW2's evidence was that they saw the appellant chasing the deceased in the vicinity of their house before hitting him on the head with a pounding stick. They described how the appellant chased the deceased twice around the compound and then strike him severally on the head. When the two tried to intervene to save the deceased, the appellant threatened to attack them. They further testified that the deceased died immediately as a result of the attack.

25. According to the witnesses the incident took place outside in their compound at about 10.00 am when they could clearly see and identify the appellant. The evidence shows that the two witnesses positively identified the appellant at the scene. In view of the incident having taken place in broad daylight which circumstances were conducive for such identification, this could not have been a case of mistaken identity of the appellant. In the circumstances, an identification parade would have been superfluous. Consequently, we are satisfied that the appellant was properly identified notwithstanding that an identification parade was not conducted. This ground is without merit and is likewise dismissed.

26. Turning to the issue as to whether malice aforethought was founded, what constitutes malice aforethought is to be found in section 206 of the *Penal Code* which provides:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
>
> a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
>
> b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> c. an intent to commit a felony;

d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

27. In the case of *Hyam v DPP* [1974] AC the Court held, *inter alia*, that:

> " Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm."

28. Malice aforethought may be inferred from the acts of the accused person as stated in *Ernest Asami Bwire Abanga alias Onyango v R* (CACRA No. 32 of 1990) where the Court held:

> " the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased."

29. In effect, it is the circumstances surrounding each case that provides guidance to the court on whether an accused person had malice aforethought at the time he or she killed the deceased person.

30. In the instant appeal, the wilful use of a deadly weapon by the appellant in this case, a pounding stick, to hit the deceased severally on the head and fatally injure him was a definitive and categoric demonstration of the appellant's intention to kill the deceased. This was further compounded by the appellant's piercing of the deceased in his stomach with an arrow shot from a bow which was also indicative of the intention to cause the victim grievous harm or death. The description of the victim's injuries in the post-mortem report which corresponds to the nature of the assault supports the inference of malice aforethought.

31. On the assertion that there were inconsistencies and contradictions in the evidence of PW1 and PW2, our perusal of the record does not disclose any discrepancies as alleged by the appellant, with the result that this ground is without merit and is rejected. That said, any minor flaws in the evidence were curable by section 382 of the *Criminal Procedure Code*.

32. All matters considered, we come to the conclusion that there is no question that the deceased died following a vicious and callous attack by the appellant, and that malice aforethought was established by his having hit him on the head severally causing fatal head injuries. As was the learned Judge, we too are satisfied that the prosecution proved its case to the required standard that the appellant murdered the deceased.

33. With regard to the severity of sentence, section 379(1) (a) and (b) of the *Criminal Procedure Code* outlines the nature of this Court's jurisdiction on appeals against sentence from the High Court.

34. This Court in *Bernard Kimani Gacheru v R* [2002] eKLR held that:

> " 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 feels that the sentence is heavy and that 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, any one of the matters already stated is shown to exist…"

35. The appellant was convicted for the offence of murder for which the death sentence is by law prescribed. Based on the guidance of the Supreme Court in the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, he was instead sentenced to serve 30 years' imprisonment. We find that the appellant had not demonstrated that the sentence imposed was harsh and excessive, particularly since he was responsible for the willful and wanton death of the deceased. For this reason, we have no basis on which to interfere with the sentence.

36. As such the appeal against conviction and sentence is without merit and is accordingly dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C. Arb, FCIArb

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR