Amweye v Republic (Criminal Appeal 256 of 2019)
[2024] KECA 1208 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1208 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 256 OF 2019

HM OKWENGU, JM MATIVO & JM NGUGI, JJA

SEPTEMBER 20, 2024

BETWEEN

MOSES ABWOTO AMWEYE ALIAS MUSA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kakamega (Sitati, J.) dated 26th October, 2018 in HCCRC No. 36 of 2012)

JUDGMENT

1. The appellant herein, Moses Abwoto Amweye, was one of two persons who were arraigned before the Kakamega High Court charged with the offence of murder. It was alleged that on July 25, 2011 at Shibunje village in the then Butere district of Kakamega County, they murdered Abdalla Wesemba (deceased).

2. Both the appellant and his co-accused, Rajab Moi Osanya (Osanya), pleaded not guilty and the case proceeded to full hearing. Unfortunately, Osanya passed away during the pendency of the trial and the case proceeded only against the appellant. The prosecution called five witnesses. Put on his defence, the appellant gave sworn testimony and called one witness.

3. At the conclusion of the trial, the learned Judge (Sitati, J.) was persuaded that the charge of murder had been made out and convicted the appellant. After conducting sentence hearing, Njagi, J. (who had taken over the matter following the transfer of Sitati, J. from the station), sentenced the appellant to twenty (20) years in prison.

4. The appellant is aggrieved by the conviction and sentence and has appealed to this Court. In the memorandum of appeal lodged by his advocate, Ms. Awuor, the appellant raised the following four grounds of appeal:

1. The learned Judge erred in fact and in law in convicting and sentencing the appellant when the prosecution evidence did not support the offence as charged.

2. The learned Judge erred in fact and in law in convicting the Appellant when the prosecution evidence was merely circumstantial evidence.

3. The learned Judge erred in law in rejecting the Appellant's defence.

4. The learned Judge erred in condemning the appellant to a sentence which under the circumstances was excessive, harsh, unconstitutional and unlawful.

5. This is a first appeal. As such, this Court is obligated to re-evaluate evidence, assess it, weigh it as a whole and reach our own independent conclusions. In doing so, we are required to bear in mind that we neither saw nor heard the witnesses testify, for which we must make allowance. This broad remit on a first appeal was well set out by the predecessor of this Court in the old case of *Okeno -vs- Republic* [1972] EA 32 thus:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] EA 336) 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. (*Shantilal M. Ruwala v. R.*, [1957] EA 570). 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; it must make its own findings and draw its own 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, see *Peters v. Sunday Post*, [1958] EA 424."

6. This is the standard of review and analysis we shall adopt in this judgment. The evidence that emerged during the trial was as follows.

7. The pivotal evidence in the case was provided by PW2 – Bakari Makokha Omuhanda (Bakari) – and PW3 – Zaituna Auma Makokha (Zaituna). Bakari is the brother to the deceased. He testified that he works as a Jua Kali artisan at Bumala Workshop in Ekero. He reported on duty there on July 25, 2011. He recalled the appellant, a person well known to him, went to see him there inquiring about the deceased. The appellant wanted the deceased's phone number. Bakari declined to give the phone number but agreed to call him from his phone. He did so. The deceased's wife picked up the phone and informed Bakari that the deceased was in the shamba. Bakari requested her to take the phone to him. She did as requested.

8. At the suggestion of the appellant, Bakari requested the deceased to go to Tavern Bar to meet the appellant. The deceased agreed. However, Bakari immediately saw a big number of *boda boda*s heading to Tavern Bar and sensed danger. He headed to Tavern Bar as well. He arrived on time to see Osanya and the appellant forcing the deceased on to a *boda boda*. The *boda boda*, accompanied by dozen other *boda boda* riders, took off. Bakari was alarmed and he phoned his relatives – including an uncle - to tell them about what had transpired.

9. When the appellant and Osanya took off from Tavern Bar with the deceased forcibly a pillion passenger on the *boda boda*, they headed to the deceased's aunt's home. The aunt is Zaituna. She testified that a big pack of *boda boda* riders descended on her home at around 10:00am on that day. She clearly recognized Osanya and the appellant (whom she referred to as "Musa") as among them. The crowd

asked her to identify the deceased's house within the homestead. She did. Feigning ignorance, they also asked her for the deceased's whereabouts – but they had him with them.

10. Zaituna told the Court that some members of the crowd budged into the deceased's house, and ransacked it. They said they were looking for a motor cycle which the deceased had allegedly stolen. Finding none, they descended on the deceased with blows from different crude weapons. Zaituna testified seeing Osanya hit the deceased with a hoe. She recalled that many other assailants whom she could not identify participated in the orgy of violence.

11. As the orgy progressed, Zaituna testified that the appellant, whom she identified as the leader of the pack, climbed on top of the deceased's grass-thatched hut and collected grass. He, then, used the grass to light a fire beneath the feet of the deceased. The crowd eventually scattered leaving the deceased's lifeless body in the compound.

12. Meanwhile, Bakari had traced the pack of riders back to Zaituna's homestead. Fearing for his own life, he testified that he stood a little far off but keenly watched the happenings. He was with his uncle. He said from that distance, he saw the appellant and Osanya marshalling the pack to administer violence on his brother. He claimed he saw the appellant hitting his brother with an axe; while he saw Osanya hitting him with a jembe. He saw many other people hitting the deceased – but he was categorical that Osanya and the appellant were among them and played a pivotal role.

13. The matter was reported to Butere Police Station where PC Juma Lubembe received the report and became the lead investigator. He visited the scene with the OCS, collected the body, the hoe and the axe he found at the scene. He testified as PW4. The hoe and the axe were produced as exhibits in the trial.

14. The post-mortem examination was conducted by Dr. Duncan Oluoch. He filled out the post-mortem form which was produced in evidence by Dr. Juma Khayombe who was familiar with his handwriting and who testified as PW5. This was because Dr. Oluoch had been transferred from the area at the time of the trial. The autopsy report showed that the deceased's body had multiple cut wounds on the head and both upper and lower limbs. He also had third degree burns on the soles of his feet and on his hands. Finally, he had a skull fracture and inhalation burns in his airways. According to Dr. Oluoch, the cause of death was haemorragic shock due to the cut injury on his head.

15. In his defence, the appellant testified that he is the Chair of the *boda boda* association and that he had received news that one of his members, Jackson Andayi, had been assaulted and his *boda boda* stolen. He said that he went to visit the said Jackson at St. Mary's Hospital, Mumias on 25th July, 2011 – the day of the incident. He said he was accompanied by Desterio Mukoya. Upon returning to the main *boda boda* stage, he said, he was told that Jackson's *boda boda* had been recovered and the thief had been killed. He was not there, he insisted, when the killing happened. On the witness stand, Desterio backed up the appellant's narrative that he accompanied him to visit Jackson at St. Mary's Hospital in Mumias.

16. After setting out the three ingredients to the offence of murder, the learned Judge had no doubt that all three had been satisfied in the case. She pointed out that both the fact and cause of death were not in doubt. What was contested, the learned Judge reasoned, was whether the appellant was one of those who caused the death; and whether he had malice aforethought in doing so.

17. On the issue of identification, the learned Judge stated:

> "In my considered view, therefore, the evidence of identification places the [appellant] herein at the scene. Further, and more compelling is the fact that the [appellant] was the last person to be seen with the deceased before the deceased died. Bakari saw him forcing the

deceased onto a motorbike before riding away with him. The accused person was also part of the crowd that was present when the deceased was set ablaze at Zaituna's home. He is the one who brought down the grass from the roof to set both the deceased and the house on fire."

18. Turning to the element of mens rea, the learned Judge reasoned as follows:

> "Lastly, on the issue of malice aforethought, the evidence on record shows that the [appellant], in the company of others went looking for the deceased in connection with the alleged theft of Jackson Andayi's motorbike. From Bakari's and Zaituna's testimonies, once the deceased was found, he was driven to his death by burning after he was seriously assaulted. There is no doubt that the intention of [appellant] herein was to either kill the deceased or to cause him grievious harm. In my considered view, the alibi defence fronted by the [appellant] has not in any way displaced the evidence of identification of the [appellant] herein as the prime mover of the deceased's murder. I, therefore, reject that defence as the said defence has not introduced any doubt in my mind regarding the guilt of the [appellant] ....."

19. The appeal was argued by way of written submissions by both parties. During the virtual hearing, Ms. Awuor, learned counsel, appeared for the appellant, whereas learned counsel, Ms. Busienei appeared for the respondent. Both parties relied on their submissions and provided brief oral highlights.

20. In his submissions as argued by Ms. Awuor, the appellant argued the grounds of appeal globally under the theme that it had not been proved beyond reasonable doubt, that the appellant was one of the assailants who caused the death of the deceased. Ms. Awuor argued that while there was ample evidence that the deceased was assaulted by a mob, there was no specific evidence pointing to the appellant as one of the perpetrators. She claimed that while PW2 and PW3 were specific that they saw Osanya assaulting the deceased, they were not specific about the role of the appellant. She insisted that evidence had shown that it was Osanya who had an axe; and the postmortem examination showed that the haermorragic shock was the result of the injury caused by the cut wound to the head – meaning that it was, in fact, Osanya who was responsible for the death of the deceased. Ms. Awuor insisted that there was no evidence showing that the appellant had caused direct injury to the deceased and the evidence that he was earlier looking for the deceased is insufficient to link him to the murder. Ms. Awuor faulted the Court for making a finding that identification had been proved yet no identification parade had been conducted.

21. Secondly, Ms. Awuor argued that malice aforethought was not proved in the case. In a bid to prove her point, Ms. Awuor insisted that the stolen motor cycle did not belong to the appellant; and that, therefore, the appellant could not have had any motive or intention to kill the deceased. The appellant was, learned counsel argued, simply the Chairperson of the *boda boda* association and only went to the scene after the incident when he learnt that a motor cycle had been stolen.

22. The ingredients of murder were identified by this Court in *Roba Galma Wario v Republic* [2015] eKLR as follows:

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

23. In the present case, the fact of the deceased's death is not in dispute. It was clearly established by the evidence of the post- mortem examination as well as by Bakari and Zaituni who witnessed the assault

on the deceased; and PW1 and the investigating officer who arrived shortly thereafter and found the deceased's lifeless body.

24. The question for determination is whether the trial court was correct to conclude that the appellant was one of the persons responsible for the death of the deceased, and whether the death was caused with malice aforethought. Under Section 206 of the *Penal Code*, malice aforethought is defined as follows:

> " 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."

25. Contrary to the appellant's submissions, the evidence given by two prosecution witnesses – Bakari and Zaituna – not only incontrovertibly places him at the scene of the murder, but also identifies him as a prime mover in the murderous assault on the deceased. Zaituna testified to seeing the appellant climbing the deceased's hut and fetching grass which was used to set the deceased on fire. On his part, Bakari testified to seeing the appellant hitting the appellant with an axe. That axe was produced as an exhibit during the trial. These testimonies remained unshaken on cross-examination and were circumstantially corroborated by three other pieces of evidence: First, the fact that it was the appellant who went to persuade Bakari to call the deceased and convinced him to go to Tavern Bar. Second, the fact that Bakari saw the appellant forcing the deceased onto a motor cycle and saw him riding away with him. Third, the fact that the head injury revealed in the post-mortem report mirrored that which Bakari saw the appellant inflicting on the deceased.

26. In short, there was overwhelming evidence that the appellant was not only a participant – but, in the words of the learned Judge – a "prime mover" in authoring the death of the deceased. There is simply no possibility of misidentification as the appellant attempts to hint at in his submissions: the appellant was a person well known to both Bakari and Zaituna; the incident happened during the day in broad daylight; the witnesses were in close proximity with the appellant – and, in fact, spoke with him; and, finally, the incident unfolded over a long period of time. Indeed, in the case of Bakari, he had an opportunity to see the appellant at three different locations and occasions: when the appellant visited him at the workshop; at the Tavern Bar; and finally, at Zaituna's home.

27. As for malice aforethought, we endorse the learned Judge's reasoning. There is no doubt that the nature of the assault and the burning was intended, at the very least, to cause grievous harm to the deceased. The learned Judge is also correct that by dint of section 21 of the *Penal Code*, malice aforethought is ascribed to all those who participated in the orgy of violence as they all had a common intention.

28. In making his ponderous arguments about lack of motive based on the fact that the stolen motor cycle did not belong to the appellant but to a third party, the appellant mistakes the mens rea for murder for motive: there is no requirement in our law to prove motive in order for the prosecution to prevail

on a murder charge. In any event, in the present case, the motive of the atavistic attack is not too far to discern: a mob-inspired but misguided act of retribution for an alleged theft of a motor cycle.

29. Finally, the appellant complains that the sentence imposed is harsh, excessive and unjust. The appellant was sentenced to twenty (20) years imprisonment. The learned Judge who imposed the sentence conducted a sentence hearing. He requested for a pre-sentence report which he duly considered. He also considered the appellant's mitigation – which was that he is youthful; is a family man; and is remorseful. Upon considering all the factors, the learned Judge imposed a sentence of twenty (20) years imprisonment. We note that the maximum sentence for the offence is the death penalty. We also note that the learned Judge pointed out the aggravating factors in the case chiefly the vicious and brutal nature of the attack; and malevolent way in which it was conducted; and the need to signal the society's opprobrium of lynch mobs.

30. It is obvious that the learned Judge exercised his discretion in fashioning the sentence. We detect no abuse of that discretion; and we find the sentence not to be excessively harsh or disproportionate as to attract our interference.

31. The upshot is that the appeal against conviction and sentence herein fails and is hereby dismissed.

32. Orders accordingly.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR