Kajembe v Republic (Criminal Appeal 57 of 2022)
[2024] KECA 1169 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1169 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 57 OF 2022

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

SEPTEMBER 20, 2024

BETWEEN

KENGA KAJEMBE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) Delivered on 30th September 2021 in Criminal Case No. 3 of 2019)

JUDGMENT

1. The appellant was charged with the offence of murder contrary to section 203 of the Penal Code and as read with Section 204 of the Penal Code. The information stated that, on 14th February 2019 at Burangi Village in Magarini Sub-County, he murdered Kea Katana (the deceased). He pleaded not guilty to the offence and the matter proceeded to hearing.

2. The facts as placed before the trial judge were that, on 14th February 2019 at about 4.00 pm, Rehema Rafiki (PW1) was at Mangweni Club selling palm wine, when the deceased and the appellant came to the club to drink wine and eat. The two sat in different locations in the club where she served both of them with wine. She stated that, in the course of the evening, the appellant rose from his seat and went over to the deceased, held his head, took out a knife and slit the deceased's neck. He then ran out of the club leaving the deceased on the ground bleeding from the injuries. She stated that members of the public pursued the appellant. The deceased died instantly and his body was later taken to the mortuary by the police.

3. On the same day, Farah Karisa (PW2) had taken palm wine to PW1 to sell on his behalf. As he was leaving the club, he heard screams and went back to the club. He found the deceased lying on the ground bleeding from his neck and in pain; and that the deceased pointed at the appellant as the person

responsible. He further testified that the appellant was still at the scene armed with a knife and issuing threats to them. They called the police, but the deceased died shortly thereafter.

4. Dr. Badia (PW3) conducted a post-mortem examination on the deceased.

5. He testified that the deceased, who was 46 years old, had a deep cut wound on the neck, and that the cervical spine was exposed; and that the cut was 16 cm long and 8 cm wide. She came to the conclusion that the death occurred due to hemorrhage shock from a cut wound on the neck.

6. Cpl Abdalla (PW4) was attached to Malindi Police Station at the time of the alleged incident. He testified that, while at the station, he saw the appellant armed with a knife having surrendered and admitted to having committed the crime. He disarmed him and placed him in police custody.

7. Cpl. Abdalla Mawazo (PW5), also a police officer from Marereni, testified as the Investigating Officer in relation to the murder. He told the court that after various inquiries and witness statements were recorded from PW1, PW2 and PW3, he was able to establish that, at the time of the incident, the appellant and the deceased were in a palm wine club at Burangi Village; that the appellant confessed to killing the deceased; and that they took him to the Senior Resident Magistrate Wasike who recorded the appellant's confession statement after satisfying herself that the appellant's confession was made voluntarily.

8. When placed on his defence, the appellant denied killing the deceased as alleged by the prosecution witnesses. He explained to the court that, on the material day, he was engaged in wine tapping. Thereafter, a fight broke out with the deceased from which he suffered serious bodily harm. It was in those circumstances that he took steps to defend himself from imminent danger to his life posed by the deceased.

9. Upon hearing the prosecution's and the defence case, the trial Judge found that the offence of the deceased's murder by the appellant was proved to the required standard, convicted the appellant and sentenced him to 27 years' imprisonment.

10. The appellant was aggrieved by the decision and has filed an appeal to this Court on the grounds that: the learned judge erred in law in not considering that there was no malice aforethought in the deceased's death under section 21 of the Penal Code and, therefore, the offence of murder was not proved beyond reasonable doubt; by not considering that he was not properly identified at the scene of crime; and in failing to consider the appellant's defense.

11. Both the appellant and the respondent filed written submissions. When the appeal came up for hearing on a virtual platform, learned counsel for the appellant, Ms. Mulago, submitted that the appellant had acted in self-defence. Hence, there was no malice aforethought, an element that must be established to sustain a conviction for murder. Counsel submitted that, according to PW1, the appellant ordered for 3 bottles of palm wine and gave two to the deceased while he remained with one. At this point, there was no bad blood or hatred between the two; that the evidence on record showed that there was a scuffle between the appellant and the deceased shortly before the appellant slit the deceased's neck with a knife; that, given the good relationship between the deceased and the appellant shortly before the fight ensued, there was no ill motive or pre arrangement to inflict any injuries; that, unfortunately, the deceased died due to the injuries sustained in the heat of the moment during the fight, which was not motivated by malice.

12. On the sentence, counsel submitted that the deceased died as a result of a fight and that, since there was no malice, the sentence ought to be set aside.

13. On their part, learned counsel for the prosecution, Ms. Fuchaka, submitted that malice aforethought was established in the way the appellant armed himself with a knife and slit the deceased's neck as evidenced by the injury that the deceased sustained on the neck; that a grudge existed between the appellant and the deceased, which was demonstrated in the manner of the assault.

14. On identification, counsel submitted that the appellant was positively identified, as PW1 stated that the appellant was a person well known to her as he was a frequent customer of the club; and that, on the fateful day, he had gone to the club to buy palm wine, and that the deceased had come to eat. Counsel submitted that the incident took place at 4.00 pm when there was proper lighting, and that the appellant did not deny being at the scene when the assault occurred.

15. On self defence, counsel submitted that although the appellant gave a sworn defence that he attacked the deceased in self defence as it was the deceased who attacked him first, the appellant's defence amounted to a mere denial; that it was not substantiated or corroborated that he was in imminent danger from the deceased as he was not armed with any weapon; and that neither was provocation on the part of the deceased demonstrated.

16. On the sentence, counsel submitted that the custodial sentence imposed was appropriate and should be upheld.

17. This being a first appeal, this Court is mindful of its duty which was well articulated in Erick Otieno Arum vs Republic [2006] eKLR thus:

> " 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 analysed. 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 analyse 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"

18. Having considered the Record of appeal and the submissions by the parties, the following issues arise for determination:

    i) whether malice aforethought was established;

    ii) whether the appellant was properly identified and

    iii) whether the defence of self defence was established.

19. Under section 203 of the Penal Code, for the offence of murder to be established, the prosecution must prove three main elements. First, that the death of the deceased occurred, secondly, that the death was caused by an unlawful act or omission on the part of the accused person and, thirdly, that the accused person had malice aforethought in causing the act or omission.

20. The ingredients of murder were identified by this Court in the case of Roba Galma Wario vs Republic [2015] eKLR where the Court observed:

> " 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."

21. The fact of the deceased's death is not disputed, and it was clearly established by the prosecution witnesses that the appellant and the deceased were in the PW1's club when the appellant walked over to the deceased, held him by the head and slit his neck. The postmortem report confirmed that the deceased died from hemorrhage shock due to a cut wound on the neck. It was not disputed that the deceased died from a severe injury inflicted on him by the appellant.

22. In his defence, the appellant claimed that the deceased attacked him when they were in the club and that, as a result, he sustained a head injury, which caused him to retaliate in self defence; and that, for this reason, malice aforethought was not established.

Section 17 of the Penal Code provides, inter alia:

> "Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law."

23. The common law principles were spelt out in the case of Palmer vs Republic [1971] AC in which it was held that:

> "It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous, others may not be. If then is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then in a mediate defensive action may be necessary. If the moment is out of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be a way of revenge or punishment or by way of paying off an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it is rejected. In a homicide case these circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out of manslaughter. Any other possible issues will remain. If in any case, the view is possible that the intent necessary to constitute the crime of murder was lacking then the matter would be left to the jury."

24. This Court in the case of *Barisa vs Republic (Criminal Appeal 60 of 2022)* [2024] KECA 219 (KLR) cited with approval the decision in Mokwa vs. Republic [1976-80] 1 KLR 1337, where it was held that:

> "Self-defence is an absolute defence even on a charge of murder unless, in the circumstances of the case, the accused applied excessive force."

25. In the case of Victor Nthiga Kiruthu & another vs R [2017] eKLR succinctly stated the principles for a finding to be reached on self defence thus:

> "i. Self-defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend oneself, one's family or one's property from a real or threatened attack. Self-defence is therefore a justification in the application of force recognized by the common law.

ii. The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self-defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.

iii. It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self-defence. It is sufficient if he apprehends an attack and uses force to prevent it.

iv. The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.

v. What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case".

See also Ahmed Mohammed Omar & 5 Others vs Republic [2014] Eklr.

26. When the appellant's defence that he was attacked by the deceased in the club is considered alongside the evidence of prosecution witnesses, it becomes apparent that his defence is not sustainable. Firstly, there is no evidence pointing to the deceased as having attacked him inside the club. PW1 testified that, on the date of the incident, the appellant walked up to the deceased who was sitting at a separate table, grabbed him by the head and slit his throat. She stated that it was the appellant, as the aggressor, who walked over and attacked the deceased. Furthermore, despite his claims, nothing showed that the deceased sought in any way to cause the appellant harm so as to warrant the violence meted out on him. Given that both the prosecution and the defence evidence does not point to any attack by the deceased that warranted the appellant's vicious attack on the deceased, we find that there was nothing that would have led the appellant to believe that his life was in danger from the deceased so as to cause him to retaliate or attack the deceased in the way that he did. Given the foregoing, we come to the conclusion, as did the learned judge, that the appellant's defence of self-defence was not established.

27. Having so found, did the prosecution establish malice aforethought on the appellant's part?

28. On malice aforethought, the trial judge had this to say:

> "...taking the inquiry of the witness statements made on both by PWO and PWT each testified that the accused assaulted the deceased while armed with a knife in his possession the prior conduct involved the bringing of palm wine for the deceased in which he returned one bottle releasing the other two for the benefit of the deceased. It did not take long before the accused gripped the deceased and using the knife targeted the neck occasioning deep cuts...A plain construction by the prosecution of the evidence on the part of the prosecution case proved beyond reasonable doubt."

29. Under Section 206 of the Penal Code, malice aforethought is defined as:

> "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."

30. In the case of Hyam vs DPP [1974] A.C. 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."

31. Malice aforethought may be inferred from the acts of the accused person as stated in Ernest Asami Bwire Abanga alias Onyango vs 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."

32. In the case of Bonaya Tutut Ipu and Another vs R, [2015] eKLR this Court cited with approval the persuasive authority of the Ugandan Court of Appeal case of Chesakit vs UG, Criminal Appeal 95 *of 2004* where the court held:

> " In determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person."

33. And in its decision in the case of Rex vs Tuper S/O Ocher [1945] 12 EACA 63 the predecessor of this Court held:

> " It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily, an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick..."

34. In the instant appeal, the appellant was armed with a knife which he used to viciously attack and injure the deceased. The willful slitting of the deceased's neck indicated that the attack was aimed at causing the victim grievous harm or death, which action is supportive of the inference of malice aforethought. See *Katana vs Republic (Criminal Appeal 48 of 2021*) [2024] KECA 463 (KLR); and Ali Salim Bahati & another vs Republic [2019] eKLR where this Court observed that:

> ...their vicious attack on the deceased was also a clear indication that they intended the consequences of their actions, that is, the death of the deceased Equally, it established malice aforethought on the part of the appellants".

35. As a consequence, we find that the prosecution proved beyond reasonable doubt that malice aforethought was proved.

36. On the appellant's identification, it is not in doubt that he was well-known to PW1 and PW2. PW1 stated that he was a frequent customer at her club, and that she had served him with wine that afternoon. As such, his identification was by way of recognition as he was known to both witnesses. In addition, the appellant admitted to having been at the scene and attacking the deceased albeit in self-defence. As did the trial judge, we too are satisfied that the appellant was properly identified.

37. With respect to the sentence, having regard to the callous manner in which the appellant willfully and viciously inflicted the injuries on the deceased leading to his instantaneous death, we find that the learned judge having properly taken into account his mitigation, the aggravating factors and circumstances of the case, we have no reason to interfere with the sentence imposed.

38. In the upshot, we are satisfied that the prosecution established its case and proved the offence of murder against the appellant to the required standards and therefore find that the conviction by the trial court was safe.

39. Accordingly, we find that the appeal is without merit and is hereby dismissed in its entirety.

40. It is so ordered.

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

A. K. MURGOR

.....

JUDGE OF APPEAL

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

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR