



**Ngirita v Republic (Criminal Appeal 122 of 2017)
[2024] KECA 1255 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1255 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 122 OF 2017
P NYAMWEYA, LK KIMARU & AO MUCHELULE, JJA
SEPTEMBER 20, 2024**

BETWEEN

ANTHONY NGIRITA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Embu (J. M, Bwonwong'a J.) dated 30th May 2017 and sentence delivered on 20th July 2017 (F.N Muchemi J) in High Court Criminal Case No. 20 of 2014)

JUDGMENT

1. Anthony Ngirita, the Appellant herein, has appealed against his conviction for the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code Act*, by the High Court at Embu (J. Bwonwonga J.) in a judgment dated on 30th May 2017 and delivered on 20th July 2017 by F. Muchemi J. in Embu High Court Criminal Case No. 20 of 2014, who subsequently imposed the sentence of death for the conviction. The particulars of the offence were that the Appellant murdered Ngari Ngeca Muchiri (hereinafter “the deceased”) on 31st May 2014 at Kamurgu Village, Mavuria Location Mbeere South District within Embu County.
2. During the trial in the High Court, the prosecution called five (5) witnesses in support of their case, and the Appellant gave unsworn testimony and did not call any witnesses. Paul Munene (PW1), testified that the Appellant was known to him and they resided in the same village as did the deceased. He narrated that on 31st May 2014 at about 8.00 pm while at a shop in Kamurugo Shopping centre and in the company of his friends, Jevaa Muriithi and John Njagi, the deceased and the Appellant passed them while walking on the road. Further, that there were solar lights from the shop where they were, which enabled him to see the Appellant and the deceased. Shortly thereafter, after about ten minutes, they heard screams and someone saying that he had been shot with an arrow.



3. When PW1 and his friends ran towards the screams, which took about 3 minutes. They saw, using the light from a torch, the Appellant standing where the deceased was, with the deceased bending over and holding his stomach where he had been stabbed with an arrow. The deceased thereupon told PW1 and his friends that the Appellant had stabbed him. When the Appellant saw them, he left. PW1 and his friends took the deceased to Kiritiri Health Centre where he was given first aid, and an ambulance took him to Embu Level 5 Hospital where he was taken to theatre for an operation. They spent the night at the hospital and later learnt that the deceased died on 2nd June 2014.
4. PW1's friends, Jervas Muriithi Kimani and John Njagi Mwaniki, testified as PW2 and PW3, and reiterated the events that unfolded on the evening of 31st May 2014 as narrated by PW1. PW3 in addition testified that he was a nephew of the deceased. Mwaniki Muchiri was PW4, a brother to the deceased. He testified that on 31st May 2014, he received a phone call from PW 3 that the deceased had been stabbed. He then went to at Embu Hospital where he arrived on 2nd June 2014 at 10.00 am and learnt that his brother had died at 6.00 am that morning. The doctor allowed him to see the body at the mortuary and he identified the deceased as his brother, and was also present when the post-mortem was conducted on the deceased by a Dr. Njiru.
5. PC Evan Kimutai testified as PW 5. He was the Investigating Officer and took over the case on 3rd July 2014 from the OCS Kiritiri Police station. He testified that the deceased was stabbed with an arrow head and was taken to Embu Level 5 hospital where he died. He collected the Appellant from Kiritiri Police station and took him to Siakago Police station. He further took blood samples from the Appellant, the deceased and the arrow head to the government chemist for DNA analysis. He produced the exhibit memo and DNA report as exhibits. He stated that he did not know the Appellant before the case. Upon cross examination he clarified that the Appellant was arrested by a Sgt. Ajero at Kiritiri Police station; the witness statements were recorded by the officers based at Kiritiri Police station and he relied on those statements to charge the Appellant. He did not visit the scene of the crime and he never prepared the sketch plan and there were no photos of the scene; and that he got the arrow head from Embu Level 5 Hospital.
6. The Appellant was put on his defence and testified that on 31st May 2014, he was working on his shamba (farm) at Kamurugu village, when he was surprised to see people some of whom he knew coming to his home at 9.00pm. The people called the AP police officers who told them to go and record the statement and he refused. He later recorded a statement on 6th June 2014 and was taken to Siakago on 11th June 2014. The Appellant denied killing anybody and stated that an arrow could not injure a person without a bow. Further, he was not arrested with anything. He told the Court that those people who implicated him in the murder were after his land and that the police at Kiritiri Police Station neither conducted a police identification parade nor informed him of his rights.
7. The Learned Judge Bwonwong'a J. in convicting the Appellant, held that the evidence of PW 1, PW 2 and PW 3 positively recognized the Appellant on 31st May 2014 as the person who was with the deceased person when going to, and at the place where they found the deceased holding his stomach a few minutes later. The learned Judge detailed the circumstances favouring recognition of the accused person during the night. Further, from the evidence, it was the Appellant who fatally shot or stabbed the deceased in the stomach. with an arrow which was produced as an exhibit.
8. Aggrieved by his conviction and sentence, the Appellant preferred this appeal and challenged the High Court's decision on the following grounds:
 1. The trial Judge erred on law and act when he failed to consider that prosecution evidence was insufficient to hold conviction



2. The Trial Judge erred in law and fact when he failed to consider that the Appellant's arresting officer was not summoned to testify how he linked the Appellant to this case.
3. The trial Judge erred in law and fact when he failed to consider that the identification relied on was not free from error.
4. The trial Judge erred in law and fact when he failed to consider that no exhibit was not found with the Appellant
5. The trial Judge erred in law and fact when he failed to consider that the Appellant was implicated due to land dispute.
6. The trial Judge erred in both law and fact when he failed to consider Appellant's defence contrary to section 169 (1) of the CPC.

9. We heard the Appeal on this Court's virtual platform on 6th March 2024, and the Appellant was present appearing virtually from Embu Prison and was represented by learned counsel, Mr. Makura. Learned counsel, Mr. Naulikha appeared for the Respondent. The two counsel relied on their respective written submissions both dated 4th March 2024, and Mr. Naulikha in addition briefly highlighted his submissions. This being a first appeal, the duty of the Court is set out in the case of *Okeno v Republic* (1972) EA 32, which is to submit the evidence adduced at the trial Court to a fresh and exhaustive examination and draw its own findings and conclusion.

However, in doing so, we are alive to the fact that the trial Court had the advantage of hearing and seeing the witnesses. Also see *Peter v Sunday Post* (1958) EA 424.

10. The Appellant has raised three main issues in his appeal. The first is that the evidence adduced did not support the conviction for murder, and the Appellant's counsel submitted in this respect that no one saw the Appellant shooting or stabbing the deceased with an arrow, and that there were discrepancies in the evidence of the witnesses, in that while PW 1 and PW 3 stated that they saw an iron arrowhead, PW 2 stated that it was a wooden arrowhead. In addition, that PW 1 and PW 2 testified that the shop of Cyprian Njagi where they were sitting was open while PW 3 testified that it was closed. Furthermore, that there was a number of crucial witnesses that were never called to testify. In particular, that PW1, PW 2 and PW 4 mentioned one Cyprian Njagi as the owner of the shop where they were and whose lights were used to identify the Appellant. The arresting officer was also another crucial witness who counsel alleged was not called to testify, and that this failure leads to the conclusion as was held in the case of *Bukenya v Uganda* (1972) EA 549 that adverse inference should be drawn against the prosecution case.
11. In response, the Respondent's counsel submitted that they called a total of five (5) witnesses, of which PW 1, PW 2 and PW 3 were eye witnesses and gave direct evidence. Further, PW 1, PW 2 and PW 3 knew both the deceased and the Appellant before the stabbing of the deceased with an arrow head, and their evidence was consistent, cogent and never contradicted even during cross examination. With regards to the failure of the prosecution to call some witnesses to testify at trial, counsel urged that this failure was not fatal to the prosecution case, and did not occasion any form of injustice to the Appellant. Further, that the arresting officer did not witness the attack on the deceased. Consequently, his evidence alone would not have added any probative value to the prosecution's case. Reliance was placed on the provisions of Section 143 of the *Evidence Act* that no specific number of witnesses is required to be called in law to testify in a criminal case.
12. We have considered the opposing arguments on the sufficiency of evidence adduced by the prosecution during the Appellant's trial. We note that the fact of the deceased's death is not disputed, nor the



cause of the death. The Appellant's advocate and prosecution counsel consented during the trial to the production of the post-mortem report on the deceased dated 9th June 2014 by one Dr. Njiru as an exhibit. The cause of death was shown in the said report to be "cardiopulmonary arrest from cardiac insufficiency from internal bleeding due to severed musculoric vessels." It is also not in dispute that the High Court in this respect relied on circumstantial evidence in finding that the Appellant was the person responsible for causing the death, since none of the witnesses saw who caused the injury suffered by the deceased.

13. The threshold required to be met in this regard was stated in *R v Kipkering Arap Koske* [1949] 16 EACA 135 and *Sawe v Rep* [2003] KLR 364 that such circumstantial evidence must exclude co-existing circumstances which would weaken or destroy the inference of guilt. In *Abanga alias Onyango v Republic* Cr. Appeal No. 32 of 1990 (UR) the Court of Appeal set out three tests to be applied to determine whether the circumstantial evidence relied on by the prosecution can lead to a conclusion that it is the accused who committed the offence under consideration. The said tests are:
 - i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
 - ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
 - iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."
14. The chain of events, from the evidence adduced by PW1, PW2, and PW3, was that the deceased was seen with the Appellant minutes before he suffered the injury that caused his death, and also found with the Appellant at the time the witnesses found him injured. In addition, the deceased informed them that the Appellant is the one who had stabbed him, and his death occurred a few days after the stabbing. The post mortem report as to the cause of death was also consistent with the nature of injury caused by the stabbing. The only inference that could be drawn from the circumstances is that it was the Appellant who caused the injury that led to the death of the deceased, as no other person than the Appellant was placed at the scene at the time when the deceased suffered the said injury. In addition, there was a short lapse of time between the time when the deceased was seen walking with the Appellant, and the time he was found injured again with the Appellant. Lastly, the statement by the deceased clearly identified the Appellant as the person who caused the injury.
15. It is also notable that there were no contradictions as alleged by the Appellant with respect to the evidence of PW1, PW 2 and PW3. They all testified being at the shop when they saw the Appellant pass by with the deceased, with PW3 stating that he was outside the shop and he did not testify to the shop being closed. All the three recognised the Appellant and deceased, and testified to their being light from the shop, and using torch light when they reached the scene of the screams by the deceased. When they reached the scene they saw an arrow in the stomach of the deceased, with PW1 and PW3 seeing an iron part of the arrow, and PW2 seeing the wooden part. We find no material contradiction in this respect between the evidence of PW1 and PW2 and that of PW3, and do not find any discrepancies in their evidence material or fatal, as they were not of such magnitude as to raise substantial doubts as to the death of the deceased or its cause.



16. As explained by this Court in *Richard Munene v Republic* [2018] eKLR:

“Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

17. We also agree with the observations made by this Court in *Phillip Nzaka Watu v Republic* [2016] eKLR as follows: -

“...when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

18. Lastly, we find no probative value that would have been added by the evidence of the owner of the shop where PW1, PW2 and PW3 were when they first saw the deceased and Appellant, or of the arresting officer, as they were not present when the deceased suffered the injury that led to his death. There was also no doubt created by the failure to call the said witnesses, and we cannot draw any adverse inferences from the said failure in the circumstances.

19. The second issue raised by the Appellant’s counsel was on whether there was positive identification of the Appellant. The counsel submitted that the intensity of the solar light, the distance of light in the shop from the road and the torch light were significant factors that should have been taken into consideration to determine whether they were sufficient for positive identification of recognition. It was his submission that they were not and that the Appellant was never positively identified or recognized. Furthermore, that when at the hospital, the deceased told PW 3 that he had an accident and hoped God would help him recover, and that this did not amount to a dying declaration, as it was not made in extremity and the deceased was not at the point of death. Reference was made to the case of *Simon Kiptum Choge v Republic* [1985] eKLR.

20. The Respondent’s counsel in reply submitted that PW 1, PW 2 and PW 3 knew the Appellant and the deceased, and their evidence was of recognition as opposed to identification. Further, that the circumstances surrounding the identification of the Appellant was also favourable for the three (3) witnesses and there were solar and electric lights that lit the road and the area on the material night.

21. The last issue raised by the Appellant was that of his alibi defence, and it he submitted that the learned trial Judge dismissed it perfunctorily but the onus was on the prosecution to displace the defence of alibi which they failed to do so. The Respondent’s counsel on his part submitted that this defence was lacking in merit and substance, and it was displaced by the prosecution, which proved its case against the Appellant since the evidence corroborated each other in all the material ways with no contradictions and inconsistencies.



22. This Court has held in the cases of *Kiarie v. Republic* [1984] KLR 739 and *Karanja v Republic* [1983] KLR 501 that an alibi raises a specific defence and an accused person who put up an alibi in an answer to a charge does not in law thereby assume any burden of proving that answer and that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution, and that it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. In *Victor Mwendwa Mulinge v Republic* [2014] eKLR, this Court (Kihara Kariuki (PCA), Musinga & Gatembu, JJ. A), while referring to the decision in *Karanja v Republic* [1983] KLR 501 held that:

“in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought.”

23. In the circumstances of the present appeal, we have found that the evidence of PW1, PW2 and PW3 corroborated each other and firmly placed the Appellant on the scene of the crime, and as the person who caused the fatal injury to the deceased. The prosecution therefore displaced the Appellant's alibi defence.

24. The last issue before us is that of the death sentence imposed on the Appellant, which he seeks to have set aside. While the Appellant did not make any further submissions in this regard, the Respondent's counsel submitted that the trial Court exercised its discretion judiciously in meting out the death penalty, which was in line with the Supreme Court guidelines in Petition No. 18 of 2022 - Francis Karioko Muruatetu II. It is our view that the decision by the Supreme Court of Kenya in *Francis Karioko Muruatetu & Another v Republic*, (2016) e KLR that the mandatory sentence of death in Section 203 and 204 of the *Penal Code* deprive courts of their unfettered jurisdiction to exercise discretion and impose appropriate sentence on a case-to-case basis in murder trials is applicable in this appeal. The record of the proceedings during the sentencing hearing were in this respect as follows:

“Ms. Manyal: The accused is a first offender.

Ms. Muriuki: The accused is very remorseful. He is sixty years old. He has been in custody since 2014. We ask the court to have mercy on him and give him a reasonable and lenient sentence.

Court: The sentence provided by the law is only one in an offence of this nature which I proceed to impose.

Sentence: The accused is sentenced to suffer death in the manner authorized by the law.

Right of appeal.

EN. Muchemi, Judge 12/4/2017”

25. It is evident that the trial Court did not consider the mitigation offered on behalf of the Appellant's mitigating factor. We have considered the said circumstances, and the change in the law that now gives us discretion to impose determinate sentences in murder cases. This Court is thus clothed with the duty to consider whether or not the Appellant herein was deserving of a lesser sentence in light of his mitigation and the circumstances of the case. The Appellant's mitigation was that he was a first offender, remorseful and elderly. We also note that from the evidence of PW3 testified to having talked to the deceased after his operation, that there may have been intervening medical factors after the stabbing of the deceased, namely his medical management after the surgical operation, that could have



contributed to his death. This factor ought to have been taken into account, and would have been relevant in determining an appropriate sentence.

26. We consequently find that the Appellant's conviction for the offence of murder was safe, and uphold the said conviction. We however allow the appeal against the sentence and set aside the sentence of death imposed upon the Appellant, and substitute therefor a sentence of twenty (20) years imprisonment from the date of the Appellant's conviction by the High Court.

27. It is so ordered.

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

P. NYAMWEYA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

