Odio v Republic (Criminal Appeal 228 of 2019)
[2024] KECA 1544 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1544 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 228 OF 2019

HM OKWENGU, JM MATIVO & JM NGUGI, JJA

SEPTEMBER 20, 2024

BETWEEN

ARMSTRONG OCHIENO ODIO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Busia (Kiarie J.) dated 6th May 2019 in HCCRA No. 23 of 2016)

JUDGMENT

1. The appellant, Armstrong Ochieno Odio, was charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code at the High Court at Busia in HCCR Case No 23 of 2016. It was alleged that on 28th May 2015 at Sikoma Sub- Location in Busiwabo Location within Busia County, he murdered his father, Jacob Odio Bwaku. He pleaded not guilty to the charge and the matter proceeded to trial. In the impugned judgment dated 6th May 2019, Kiarie J. convicted the appellant of the offence and sentenced him to suffer death.

2. As a first appellate Court, we are obligated to consider the evidence presented before the trial court and arrive at our own independent conclusions. However, we must remain conscious of the fact that unlike the trial court, we did not have the benefit of hearing and observing the witnesses testify in order to gauge their demeanor. In this regard, this Court in Dickson Mwangi Munene & another vs. Republic [2014] eKLR stated:

> "This being a first appeal, this Court is obliged to re-evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should

therefore be slow to reverse the trial judge's finding of fact unless it is supported by the evidence on record."

3. The prosecution case stood on the testimony of 8 witnesses. PW1, Linus Taabu Mukolo, a passerby testified that on 28th May 2015 at around 4pm, while headed to Matayos, he heard screams and rushed to the scene only to find the appellant cutting his (own) father using a machete. He stated that he was unable to stop the appellant because the appellant was very wild. PW2, Patrick Osore Benson, also witnessed the appellant cutting his father with a machete. He stated that the appellant threw the machete he was holding in a culvert, took out Kshs. 200/= from his pocket and asked him to look for a boda-boda to take him to the police station. However, the boda-boda riders refused to ferry the appellant, prompting him to leave the scene and walk towards Siwongo. PW3, Fredrick Pamba found the deceased already dead and placed stones near the body to prevent it from being swept away by the storm water since the body was lying in a trench.

4. PW4, Geoffrey Wandera Odio, a brother to the appellant and PW5, Helga Agola Odio, the appellant's mother confirmed that the appellant and the deceased used to quarrel a lot about land; and that the appellant was intending to sell land which was still in the deceased's name. PW4 testified that on 28th May 2015 at 4pm, he saw the appellant holding a machete. He threatened to kill himself and PW5 and insisted that their father would be buried before the planted maize was ready for eating. PW4 testified that he told his father to report the threats to the police station while he proceeded to sell milk at Nambale, only to be called by one David Maka who informed him that the appellant had killed their father.

5. PW6, Dr. Hillary Kiplagat produced the post-mortem report on behalf of Dr. Peterson Kobuta who had stopped working for the government. The findings were: (a) a penetrating cut on the right maxilla and mandible, which had destroyed tissues in the area. (b) a penetrating injury that had cut through the left nostril and mouth. (c) a penetrating injury on the left distal one-third of the forearm which had cut off the forearm. (d) a penetrating injury on the right posterior elbow. (e) severed great vessels of the head, and, (f) severed brain tissues on the occipital lobe. The cause of death was severe head injury and hypovolemic shock (low volume of blood due to bleeding).

6. PW7, CPL Jared Ndege received a call at 4:30pm on 28th May 2015 from the Administration Police at Busibwabu informing him of the murder. He did not find the appellant at the scene. However, with the help of eye witnesses the murder weapon was recovered and the body was moved to Busia County Mortuary. Subsequently, after one year and 3 months, he received information that the appellant had been seen in Homabay, and with the help of the OCS Homabay, the appellant was arrested. SGT Benjamin Wechuli attached to scenes of crime Bungoma processed the photos of the scene and produced the photos and the certificate.

7. Upon being placed on his defence, the appellant elected to give an unsworn statement. He did not call any witness in support of his defence. Briefly, he stated that the deceased was his friend and that he did not murder him.

8. In the impugned judgment, the learned Judge observed that the appellant inflicted severe injuries upon the deceased, that there was clear evidence demonstrating his intention to kill the deceased and therefore it was proved beyond reasonable doubt that the appellant had the requisite malice aforethought, therefore, the prosecution had proved its case beyond any reasonable doubt. Accordingly, the learned Judge convicted the appellant and sentenced him to suffer death.

9. Aggrieved by the said verdict, the appellant seeks to overturn it citing the following grounds: (a) the trial Judge failed to note that the charge sheet was incurably defective. (b) the prosecution evidence

was hearsay and contradictory. (c) the trial Judge failed to evaluate the entire evidence. (d) that the trial Judge disregarded his mitigation and imposed a death sentence which is retrogressive, harsh and unconstitutional. (e) the trial Judge ignored the gross violations of his constitutional rights to a fair trial as enshrined under Article 50 of *the Constitution*. In his supplementary memorandum of appeal dated 30th March 2021, the applicant states that his guilt was not proved by evidence and that mens rea was not proved.

10. On behalf of the appellant, his counsel, Mr. Lore, contended that the prosecution failed to prove its case beyond reasonable doubt. Further, the death threats were not proved. Counsel contended that PW1 and PW5's evidence was not credible, and PW1 and PW5's testimony was contradictory. He argued that whereas PW4 claimed that he emerged screaming and saw the appellant murdering the deceased, PW5's evidence was that PW4 was not around at the time of the incident since she was attending a funeral and she only got information that her husband had been killed. Counsel submitted that PW1's evidence that the appellant was using a machete on the deceased is not supported by any evidence since he did not point out which part of the body was affected.

11. Mr. Lore also submitted that the existence of a quarrel justified the defence of provocation and, therefore, the learned Judge ought to have applied his mind to the provisions of section 207 of the Penal Code and relied on Samuel Kipngeno Birir vs. R [2012] eKLR. Counsel maintained that the trial court failed to properly analyze the evidence. Further, he argued that PW7 confirmed that the appellant was not found at the scene, that the person who saw the murder weapon was never called as a witness, nor were fingerprints lifted from the machete.

12. Learned counsel for the respondent, Ms. Busienei, submitted that there is no dispute that the deceased was hacked to death. Further, the postmortem report stated that the cause of death was severe head injury and hypovolemic shock secondary to excessive bleeding.

13. Counsel submitted that there was sufficient uncontroverted evidence by PW1, PW2 and PW4, that the appellant hacked the deceased using a machete, and PW5, PW1 and PW2 knew the appellant because they were neighbours.

14. Regarding malice aforethought, counsel submitted that PW4 testified that the appellant used to threaten the deceased with death over a land dispute and the appellant's mother, PW5, corroborated that evidence. Furthermore, it was PW4's evidence that on the fateful day, the appellant pulled out a machete from his gum boots and threatened the deceased that he will be buried before the maize crop for that season was ready and indeed the deceased was hacked with the same machete and he died a very painful death because of the injuries sustained. Consequently, the threats and being armed with machete and the vicious force used, point to the existence of malice aforethought. Counsel cited Ali Salim Bahati & Another vs. Republic [2019] eKLR where this Court found that the vicious attack on the deceased was a clear indication of the intention to kill and as a result, malice aforethought was established.

15. On the sentence, although the same was not raised in the appeal, counsel conceded to setting aside of the mandatory death sentence. However, since the appellant did not give any mitigation, counsel urged the court to sentence the appellant to a definite term.

16. We have considered the evidence adduced before the trial court, the respective submissions, authorities relied upon and the law. In our view, the issues arising for determination are:

    (a) whether the prosecution proved its case to the required standard.

    (b) whether the prosecution evidence was marred by contradictions.

(c) whether this Court should interfere with the death sentence imposed on the appellant.

17. Section 203 of the Penal Code defines the offence of murder as follows:

> " Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

18. A reading of the above section shows that to succeed in a murder case, the prosecution must prove the following ingredients: (a) The death of the deceased. (b) That the death was caused by an unlawful act or omission on the part of the accused. (c) That in causing the death of the deceased, the accused had malice aforethought. (See this Court's decision in Titus Ngamau Musila Katitu vs. Republic [2020] eKLR). It is common ground that the deceased was killed, therefore, the first pre-requite is not in issue. We will focus on the remaining ingredients.

19. We will start with malice aforethought which refers to an intentionally harmful act that typically leads to someone's death. Malice aforethought is a critical element of the crime that distinguishes the offence of murder from other types of homicide cases, such as manslaughter. Malice aforethought shows the following: (a) The killer's state of mind at the time of the murder,

b. The killer thought about the murder before committing it, and,

c. The killer took specific steps to facilitate the murder.

20. Malice aforethought may be express or implied. Express malice aforethought refers to when a deliberate intention is manifested to take away the life of a person unlawfully. Implied malice aforethought applies when no considerable provocation appears or when the circumstances attending the killing show a reckless and wicked heart. To be convicted of murder, malice aforethought must be proved. Malice aforethought cannot be imputed to an accused person based solely on their participation in a crime. If it is shown that the killing resulted from an intentional act with express or implied malice aforethought, no other mental state need be shown to establish malice aforethought. In Nzuki vs. Republic [1993] eKLR, this Court defined malice aforethought as:

> ...a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of Regina v Vickers, [1957] 2 QB 664 at page 670. An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of Conliffe v Goodman, [1950] 2 KB 237."

21. The threshold for determining malice aforethought is provided in section 206 of the Penal Code, which provides:

206. Malice aforethought 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.

22. In Nzuki vs. Republic (supra), this Court stated:

> "Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:
>
> i. The intention to cause death;
>
> ii. The intention to cause grievous bodily harm;
>
> iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts.
>
> It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.
>
> Without an intention of one of these three types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder. See the case of Hyam v Director of Public Prosecutions, [1975] AC 55."

23. PW4 and PW5 testified that the appellant and his father had, in the past, constantly quarrelled over a piece of land the appellant intended to sell but the same was registered in the name of the deceased. It is also PW4's evidence that before he left their home on the fateful day, the appellant had threatened to kill both of them using a machete he had removed from his gumboots and the appellant had also reiterated that his father will be buried before the maize planted on their farm was ready for harvesting. There is evidence that the appellant severally inflicted deep cuts on the appellant using the machete. There were cuts on the head, severed blood vessels of the head, and severed brain tissues among other serious cuts. The weapon used and the nature of the injuries inflicted suggest a premeditated intention to kill.

24. Regarding the issue of whether the appellant was properly identified as the offender, PW1 heard screams by the wife of the deceased and rushed to the scene where, on arrival, he found the appellant in the act of butchering the deceased using a machete. PW2 found the appellant cutting the deceased with a machete and that the appellant even handed PW2 Kshs. 200 for him to procure a boda boda to take the appellant to the police station. PW2 identified the machete the appellant used to kill the deceased. PW1 and PW2's evidence was corroborated by PW7 who found the deceased lying dead with severe cuts all over the body and with the help of eyewitnesses he recovered the murder weapon. The witnesses not only saw the appellant committing the offence during the day, but both of them had known him as a neighbour from before the incident hence making the identification one by recognition. From the

foregoing, we are satisfied that it was the appellant who killed the deceased. The appellant's defence that the deceased was his father and was his friend did not dislodge the prosecution evidence implicating him as the offender.

25. Next, we will address the appellant's contestation that PW1 and PW5's evidence was marred by contradictions, which went to the root of the case. The respondent did not address this issue. This court's duty is to determine whether there were contradictions and inconsistencies in the prosecution evidence to the extent that a reasonable person would be left in doubt as to whether the charges were proved, or whether the contradictions (if any), are so material that the trial court ought to have rejected the evidence. As was held by the Ugandan Court of Appeal in Twehangane Alfred vs. Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6, it is not every contradiction that warrants rejection of evidence. It subtly stated: -

> " ... the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

26. Similarly, in Joseph Maina Mwangi vs. Republic [2000] eKLR, this Court (Tunoi, Lakha & Bosire JJ.A.) 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 CPC, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

27. It was the appellant's argument that PW1's evidence reveals that PW5, who is the deceased's wife, witnessed the murder since it was her screams that alerted PW1. However, it was PW5's evidence that she had gone for a funeral when the murder occurred and that she was informed that the appellant had killed his father. It is our view that the discrepancy on who was screaming is trivial in this matter and does not affect the substratum or the main issue before us.

28. Regarding sentence, it is important to note that this court can only interfere with a sentence passed by the trial court if it is satisfied that the trial court erred in the exercise of its discretion. In Ogolla s/o Owuor vs. Republic, [1954] EACA 270 the East African Court of Appeal stated thus:

> " The court does not alter a sentence unless the trial judge acted upon wrong principles or overlooked some material factors. To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R vs. Shershowsky (1912) CCA 28TLR 263)."

29. The learned Judge sentenced the appellant to death, as it was the only sentence prescribed by the law at the time under section 204 of the Penal Code. However, the Supreme Court in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR found that the mandatory nature of the death sentence under section 204 of the Penal Code is unconstitutional, as it does not allow the consideration of the mitigating factors put forth by the accused in order to determine an appropriate sentence that meets the ends of justice. The death sentence is, however, not outlawed as the Supreme Court held that it is still applicable as a discretionary maximum penalty.

30. A perusal of the trial court's record reveals that the appellant's mitigation was considered. The learned Judge considered the nature of the offence and the circumstances under which the offence was

considered. Sentencing is essentially a matter of court's discretion, and an appellate Court can only interfere with sentence where the trial court improperly exercised its discretion. Sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed. This decision was rendered after the Supreme Court decision in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR. We however, note that the learned Judge did not refer to the Supreme Court decision. However, we note the seriousness of the offence and the gruesome manner in which it was executed, and substitute the death penalty to a life sentence. In keeping with the emerging jurisprudence from this Court, (see for example Evans Nyamari Ayako vs. R Kisumu Criminal Appeal 22 of 2018), we hereby translate the indefinite life imprisonment to a term of 30 years.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR