



**Ngota v Republic (Criminal Appeal E030 of 2023)
[2024] KECA 1663 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1663 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL E030 OF 2023
MSA MAKHANDIA, PO KIAGE & A ALI-ARONI, JJA
NOVEMBER 22, 2024**

BETWEEN

SAMSON ALUBE NGOTA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nairobi
(Lagat-Korir, J.) dated 30th January, 2017 in HCCRC No. 28 of 2011)*

JUDGMENT

1. On the evening of 19th March 2011, Rahab Nyawira (deceased) and her cousin, Sabina Muthoni Githinji (PW1), residents of Kariobangi South Estate in Nairobi, visited their cousin, Bilha Wangui Mungai (PW2), who lived about 500 meters away. At around 11pm, after having dinner, PW1 and the deceased left for their house. As they walked to their house, the appellant, and another, accosted them. The appellant pushed the deceased against the wall of an adjacent unfinished building and as they struggled, PW1 dashed back to PW2's house to seek help. She knocked on the gate but there was no response. She picked up a piece of wood and hit the appellant with it. Soon thereafter, the gate was opened prompting the appellant and his accomplice to flee. PW1 observed that the appellant was wearing a blue jeans trouser and a greenish shirt. His partner was clothed in a blue jeans trouser, a bluish shirt and a black jacket.
2. As PW1 and the deceased entered PW2's house, the deceased was seen holding onto her neck and chest while saying, 'Hawa watu wameniua' ("These people have killed me"). She started vomiting blood, fell on the chair and then on the floor. PW1 and PW2 noticed that the deceased was bleeding from her left side of the chest. They called for help from neighbours to assist in taking her to hospital. However, on the way to hospital, the deceased passed away. The following morning, PW2 visited the scene of the incident and spotted a knife pocket that was red in colour. She took it to the police where she reported the matter. On 24th March 2011, the appellant and his accomplice were seen at the burial of the son to



- David Adali Abednego (PW6). The appellant lay on the table while his partner sat on a chair. Next, the partner was heard saying that he was going to buy a cigarette as the appellant fell asleep on the table. While lying on the table, PW6 sighted a knife with blood on the left side of the appellant's waist. He pulled out the knife from the appellant and called the police.
3. No. 61190 Cpl. Makali (PW4) testified that on 24th March 2011 at around 4am while he was patrolling Dandora mobile area with colleagues, the Controller called them and instructed them to call a certain mobile number. When they called, they were informed that someone had been arrested. They proceeded to the scene of the arrest in Dandora Phase II, where they met PW6. PW6 told them that he had arrested someone with a blood-stained knife within his premises. He showed them the appellant whom they re-arrested and took the blood-stained knife with them. They took the appellant to Dandora Police Station where they were notified that an offence had been committed around Dandora area. No. 76416 PC Kemo Morara Josephat (PW8), a police driver previously working at Dandora Police Post, corroborated PW4's testimony.
 4. No. 378835, PC Simon Mokaya (PW12), the investigating officer, gave evidence that on 20th March 2011, while on duty, he received a report of the death of the deceased from her brother, PW3. He went to Kariobangi South where he was shown the scene of crime. He was also shown where the knife sheath had been recovered and he took it as an exhibit. PW12 proceeded to the Kenyatta National Hospital where he saw the body of the deceased. On 22nd March 2011, together with the relatives of the deceased, they transferred the body to Montezuma Funeral Home and a post-mortem was conducted. PW12 asked the Pathologist to get blood samples from the body which, together with the knife sheath, the knife and the appellant's clothes, were taken to the Government Chemist for analysis. On 24th March 2011, while at the Police Station, he heard that some suspects had been arrested in Dandora and a knife had been recovered from them. He went to Dandora Police Station where he compared the knife with the sheath. He took custody of the knife. Thereafter, the appellant was taken to Buruburu Police Station for an identification parade.
 5. No. 232172, C.I Peter Mwaura (PW10), formerly Deputy OCS at Buruburu Police Station, conducted the identification parade. In his testimony, he explained the manner in which the identification parade was conducted. He observed that PW1 identified the appellant by touching him on the chest. PW10 produced the identification parade form in evidence. Dr. Peter Muriuki Ndegwa (PW11), from the Ministry of Health Department of Diagnostic and Forensic Services Medico-legal Section, conducted a postmortem on the body of the deceased. The body was identified by the deceased's brother, PW3, and her uncle, one Ibrahim Maina. PW11 observed that, the body had a penetrating stab wound on the mid left upper arm and another on the left under arm; the chest cavity had a penetration between the 2nd and 3rd rib on the left; the left lung had been stabbed and there was a 1500ml bleeding into the chest cavity. From those observations, PW11 concluded that the cause of death was hemorrhage from severe chest injury, due to a stab wound. The postmortem report was produced in court as an exhibit.
 6. Henry Kiptoo Sang (PW9), a government analyst at the Government Chemist Department in Nairobi produced a report prepared by his colleague who had since retired, one Paul Waweru Kangethe. The report indicated that on 22nd and 31st March 2011, the following items were received at the laboratory from PC Simon Mokaya of Buruburu Police Station; blood sample of the deceased, a dagger sheath, the appellant's clothes comprising of a pair of blue jeans trousers and a dark brown short-sleeved shirt, and a dagger. A police memo form requested for examination of the items to determine the presence and source of blood stains. Upon analysis, it was found that the dagger sheath and the appellant's clothes were not stained with blood. The dagger itself was slightly stained with blood. The report concluded that the DNA profile on the dagger matched that of the deceased. Dr. Georgina Wangui Kamunge



- (PW7), a psychiatrist at Mathare Hospital, testified that she conducted a mental state evaluation of the appellant and found him to be in good mental status. She produced a report of the same.
7. That, in summary, was the prosecution case as presented against the appellant and his co-accused who were arrested and charged with the murder of the deceased. In a ruling delivered and dated 25th November 2015, the trial Judge (Lagat-Korir, J.) found that the prosecution had established a prima facie case against both accused persons and placed them on their defences. The appellant elected to give an unsworn statement. He denied committing the offence he was charged with stating that, on 24th March 2011, while he was attending a burial in Dandora Phase II Uhuru Park, two police officers arrested him. They took him to a police station and, at around 11.00am, he was removed from the cell and told that he was going to Buruburu Police Station. On the way, the car stopped and picked a certain lady who was dropped off on the way. At Buruburu Police Station, he was detained in a cell and at around 3pm, he was taken to an identification parade. The appellant claimed that at the identification parade, the lady whom the police had given a lift on the way pointed at him. At 4pm, three police officers went to interrogate him. That is when he learnt that he was being accused of murder.
 8. The learned Judge by a judgment dated and delivered on 30th January 2017, found the charge of murder proved beyond reasonable doubt as against the appellant and convicted him accordingly. He was sentenced to suffer death. His co-accused was acquitted due to insufficiency of evidence against him.
 9. The conviction and sentence aggrieved the appellant who then appealed to this Court raising six grounds in his memorandum of appeal, which can be summarized that the learned Judge erred by failing to; Re-evaluate the whole evidence and thus reached an unjustified decision. Find that the prosecution case was not proved to the required standard. Give cogent reasons for rejecting the defence evidence. Comply with section 169(1) of the Criminal Procedure Code.
 10. When we heard the appeal, learned counsel Ms. Chepseba appeared for the appellant while Mr. Maroro the learned Prosecution Counsel appeared for the Republic.
 11. Ms. Chepseba contended that the prosecution did not prove its case against the appellant beyond reasonable doubt. She urged that there was no eye-witness account and thus the trial court relied on circumstantial evidence which, in her view, was weak. Counsel argued that the circumstances on the material night were not favourable for PW1, the only identifying witness, to properly identify the appellant and his clothing as she alleged. Citing MAITANYI VS. REPUBLIC [1986] eKLR, Ms. Chepseba faulted the learned Judge for failing to exhaustively inquire into the intensity of lighting that PW1 used to identify the appellant, in terms of what source of light, its size and its position relative to the appellant. Counsel contended that in the circumstances, the evidence of PW1 was not free from possibility of error and hence we should disregard it.
 12. It was contended that given the conditions favoring correct identification were difficult, the trial court should not have considered, as part of the prosecution evidence, the clothes that were allegedly worn by the appellant at the scene of crime. To counsel, there were glaring inconsistencies in the evidence of identification which should have been resolved in favour of the appellant. The inconsistencies related to the colour of shirt that the appellant reportedly wore on the material night. While in her statement to the police PW1 described the appellant in the following manner, ‘The guy who was dressed in a shirt strips with blue jeans, short and black in complexion jumped and started squashing my cousin (the deceased) against the wall...,’ on testifying in court, she explained that the appellant was clothed in a blue jean trouser and a greenish shirt. Further, in his testimony, PW12 portrayed the shirt that the appellant wore on the fateful night as being grey in colour and, among the items that were presented to the government chemist for examination, was a dark brown short sleeved shirt belonging to the



- appellant. Ms. Chepseba expressed doubt with the fact that when the appellant was arrested, four days following the commission of the crime, he still wore the same clothes. To her, the identification of the appellant was wanting.
13. Next, Ms. Chepseba took issue with the fact that the statement of PW6, the person who recovered the murder weapon from the appellant, was taken three years later. She indicated the appellant's suspicion that the murder weapon may not have been handled professionally as required by the Police Force Standing Orders and the Guide to Criminal Investigations. Counsel argued that if indeed the murder weapon was found on the appellant, the blood stains of the deceased would have touched his shirt and trousers, which was not the case according to the government chemist report. Counsel questioned why the blood sample of the appellant was not presented to the government chemist for DNA profiling, urging that there ought to have been corroboration as to from whom or where the suspected murder weapon was obtained from.
 14. Ms. Chepseba queried why voice identification was not done at the identification parade, in view of PW1's testimony that before the attack the appellant uttered the following words, 'where do you think you are going?' She insisted that the identification parade was not free from error for reasons that while PW10 stated that PW1 identified the appellant only, PW1 maintained that she also identified the appellant's co-accused. Moreover, after the identification parade was conducted, the appellant indicated that he was not satisfied because he not aware of what had happened. Counsel submitted that in view of the appellant's testimony that while he was being transported to Buruburu Police Station, the police picked up a lady who later turned out to be PW1, the trial court ought not have believed PW1 over the appellant. The learned Judge was also faulted for failing to consider the defense evidence. To counsel, had the trial court considered that evidence, it would have reached a different decision and possibly acquitted the appellant. On sentencing, counsel contended that the sentence meted out was too harsh. She urged that should we find that the appellant's conviction was sound, then he should benefit from resentencing by this Court on the strength of the Supreme Court decision in FRANCIS KARIOKO MURUATETU & ANOTHER Vs. REPUBLIC [2017] eKLR (MURUATETU).
 15. In reply, Mr. Maroro asserted that the prosecution proved its case beyond reasonable doubt. He submitted that identification of the appellant was properly done to the extent that PW1, who was with the deceased on the fateful night, stated that there was moonlight and the distance between the appellant and the deceased was very close. So much so that she could clearly see what the appellant wore and his physique. Further, PW1 was able to positively identify the appellant at the identification parade. Mr. Maroro continued that the knife, which was the murder weapon, was recovered from the appellant and when a DNA analysis was done it was found that the DNA profile on the knife matched the blood sample that had been taken from the deceased. The knife sheath that was recovered at the scene of crime also fitted the knife perfectly. Counsel submitted that according to the *Evidence Act*, no specific number of witnesses is required in order to prove a criminal case, even a single witness was adequate so long as she was credible. It was urged that the conviction of the appellant was proper and the sentence lawful. We inquired from counsel whether in view of the Supreme Court decision in MURUATETU (supra) the sentenced meted out ought not be reviewed. At first Mr. Maroro was adamant that we should maintain the sentence imposed but upon our further probing, he left the issue to the Court.
 16. In a brief reply to Mr. Maroro's submissions, Ms. Chepseba reiterated that the prosecution had not proved its case beyond reasonable doubt and thus the conviction was unsafe. She urged us, upon re-evaluating the entire evidence, to quash the conviction, set aside the sentence and set the appellant at liberty unless lawfully held.



17. We have given due consideration to those submissions and weighed them in light of all the evidence tendered on record which we have carefully and exhaustively evaluated and analyzed with a fresh and independent eye so as to draw our own inferences of fact. This is our duty as a first appellate court proceeding by way of a rehearing although we do not have the advantage of hearing and observing the witnesses in live testimony. See PANDYA vs. REPUBLIC [1957] EA 336; OKENO vs. REPUBLIC [1972] EA 32;

Naturally, therefore, we accord the necessary respect to the findings of the trial Judge especially those turning on the credibility witnesses.

18. We think the issues for determination in this appeal are two- fold namely; whether the prosecution proved its case against the appellant beyond reasonable doubt and, whether the sentence meted out should be reviewed in light of the decision of the Apex Court in MURUATETU (supra).
19. The appellant contends that the trial court relied on weak circumstantial evidence to convict him. He argues that the intensity of lighting on the material night was not adequate to aid positive identification. Further, that there were glaring inconsistencies in the description of the colour of the shirt that he apparently wore on the fateful night. A perusal of the learned Judge's judgment indeed shows that she was persuaded that the prosecution case partly rested on circumstantial evidence. In considering whether the accused persons were properly identified, the learned Judge noted that the defence had expressed doubt about the strength of lighting at the scene. The learned Judge, however, proceeded to find that it is probable that PW1 saw what the appellant wore, in view of her testimony that there was light from the houses nearby. Further, she had reasonable time to see the attackers, considering that when she banged the gate and it was not opened, she picked a piece of wood and hit the appellant who had pressed the deceased on to the wall.
20. We further note the learned Judge's observation that the appellant did not disown the clothing when it was presented in court as exhibit. The appellant now challenges the clothing he apparently wore on the material night, claiming that there were glaring inconsistencies in the description of his attire. While it is evident that in her written statement, PW1 stated that the appellant was dressed in 'a shirt strips with a blue jeans' and in her testimony before court she indicated that he had 'a blue jeans trouser and a greenish shirt,' a review of her evidence on cross-examination shows that she clarified the alleged inconsistency. Upon cross-examination by the appellant's counsel which had the effect of clearing any doubts that might have arisen. PW1 explained, 'The strips I meant are these lines here on the shirt.' We are therefore not persuaded that anything turns on the claim that there were inconsistencies in the evidence of identification.
21. The learned Judge was also faulted for relying on the evidence of a single identifying witness. Our reading of the learned Judge's judgment, however, reveals quite the contrary. We observe that the learned Judge was mindful of the time when the incident happened and the fact that it happened so fast and thus subjected PW1's evidence of identification to thorough testing and sought corroboration. The learned Judge found such corroboration in the evidence of PW6 and the forensic evidence provided by the government analyst. PW6 testified that the appellant and his co- accused turned up at his home where there were burial arrangements for his son. The appellant then happened to fall asleep on the table and while lying there, PW6 saw a blood-stained knife protruding from his pocket. He removed the knife and called the police. When the knife was taken for analysis at the Government Chemist, it was found that the DNA profile generated from the blood stains on the knife matched the DNA profile of the deceased. Bearing in mind that the knife was recovered from the appellant, the trial court reached the inescapable conclusion, as we do, that the appellant was responsible for the stabbing to death of the deceased.



22. The appellant further criticised the learned Judge for failing to consider his evidence or giving reasons for rejecting it. Our review of the appellant's evidence shows that he merely stated that on 24th March 2011, he was attending burial arrangements in Dandora Phase II when he was arrested by two police officers and that later he learnt that he had been charged with murder. Against the overwhelming circumstantial evidence that left no doubt as to his guilt, the appellant's defence which was only a denial of committing the offence was not in the least going to absolve him. Indeed, his testimony served to lend further evidence to that of PW6 As the Supreme Court observed in REPUBLIC Vs. AHMAD ABOLFATHI MOHAMMED & ANOTHER [2019] eKLR;

“[56] On its application, circumstantial evidence is like any other evidence. Though, it finds its probative value in reasonable, and not speculative, inferences to be drawn from the facts of a case, [Marie-Pier Couturier, “Circumstantial evidence should not be overlooked by Claims Adjusters”.....available at; (mccagueborlack.com/emoils/articles/possessive.htm)] and, in contrast to direct testimonial evidence, it is conceptualized in circumstances surrounding disputed questions of fact [Jowitt's Dictionary of English Law, 4th Edition, Vol. 1, p. 418], circumstantial evidence should never be given a derogatory tag. Jowitt's Dictionary of English Law, 4th Edition, states thus of circumstantial evidence:

“... with circumstantial evidence, everything depends on the context: circumstantial evidence can sometimes amount to overwhelming proof of guilt, as where the accused had the opportunity to commit a burglary, and items taken from the burgled house are found in his lock-up garage, ... a fingerprint recovered from the window forced open by the burglar matches the accused's fingerprints, ... [or where there is] a ... DNA match between the accused's control sample and genetic material recovered from the scene of the crime
....”

(57) This is why, way back in 1928, the English Court of Appeal asserted that circumstantial evidence “is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.” [See R v Taylor Weaver and Donovan (1928) 21 Cr. App. R 20.]”

23. We are of the considered view that the appellant was correctly and safely convicted on sound and cogent evidence. His appeal against the same is devoid of merit.

24. As to the sentence of death imposed, we note that it was based on the learned Judge's application of the law as it was then to the effect that the death sentence was mandatory for the offence of murder. That decision was binding upon the learned Judge and she cannot be faulted for having followed it. However, we are now guided by the Supreme Court's decision in MURUATETU (supra) that a mandatory sentence of death is unconstitutional. Consequently, we are inclined to interfere with the mandatory sentence that was imposed by the trial court and will consider an appropriate term sentence bearing in mind the circumstances surrounding the commission of the offence, including the infliction of a single stab wound.

25. The totality of our consideration of this appeal is that it partly succeeds to the extent that, we set aside the death sentence and substitute therefor a term of twenty (20) years imprisonment to run from the date the appellant was first sentenced.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER, 2024.

ASIKE-MAKHANDIA



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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL ALI-ARONI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

