Ochieng v Republic (Criminal Appeal 27 of 2018) [2024] KECA 1682 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KECA 1682 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 27 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

NOVEMBER 22, 2024

BETWEEN

VICTOR OCHIENG .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisumu (Majanja, J) delivered on 27th February, 2017 in HCCRC No 39 of 2014)

JUDGMENT

1. The appellant, Victor Ochieng, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence as stated on the information was that on the 26th April, 2014, at Karapul Village in Siaya District within Siaya County, jointly with others not before the court, they murdered Peter Onyango Ododa (the deceased).

2. The appellant pleaded not guilty to the charge, and the matter proceeded to trial. During the trial, the prosecution called six witnesses.

3. Briefly, their evidence was as follows: Some cows belonging to PW4 Roseline Adhiambo Abiero (Roseline), were stolen on 23rd April, 2014. Consequently, PW2 Dan Afwoka (Dan), went to Roseline's home on 26th April, 2014 to commiserate with her. As they were in the home, the appellant arrived riding a motorbike carrying the deceased, in tow were two other motorbikes which also had passengers. The appellant and the people who arrived with him, then assaulted the deceased using slaps and sticks; while asking him to produce the cows that were stolen. PW1, Richard Ododo Were (Richard), a neighbor in the vicinity, heard the deceased screaming. He went to the scene where he found the deceased being assaulted by the appellant and a crowd of about thirty people. The deceased was taken to his father's gate which was about 120 meters away. After about 30 minutes, Roseline followed them. She found the appellant lying down, and there were many people around. PW 3 Peter

Oduor Obondo (Obondo), a mason who was working in a nearby home was also attracted by the noise, and upon going to the scene found the deceased tied up, seated down, and blood oozing from his head. Obondo did not see anyone beating the deceased. According to Obondo, the appellant was preventing other people from beating the deceased. The deceased was subsequently taken to hospital but he succumbed to his injuries.

4. On 1st May, 2014, PW5, Dr. Willis Ochieng (Dr Ochieng), a medical officer at Siaya County Referral hospital, carried out a postmortem examination on the body of the deceased. He noted injuries on several parts of the body, including the head. He concluded that the cause of death was cardio respiratory arrest, due to increased intercranial pressure, caused by severe head injury. PW6, PC Phonas Muragoli (PC Muragoli) an officer attached to CID Siaya Police Station, was the investigating officer. He interrogated the witnesses and recorded their statements before causing the appellant to be charged.

5. In his defence, the appellant made a sworn statement in which he explained that he had found the deceased being beaten by a mob of about thirty people, on allegations that he had stolen some cows. He tried to stop the mob from beating the deceased, but did not succeed.

   He denied assaulting the deceased, maintaining that he assisted in taking the deceased to hospital.

6. The learned Judge upon considering the evidence found that the evidence of Richard, Dan, Obondo and Roseline, established that the deceased was assaulted by a mob; that he was taken to hospital where he was pronounced dead; and that the evidence of Dr. Ochieng confirmed that the deceased died from a severe head injury arising from an assault.

7. In regard to the question whether the appellant was part of the mob that assaulted the deceased, the learned Judge rejected the appellant's defence that he went to the homestead of Roseline on his own volition, to assist the deceased who was being beaten by a mob. The learned Judge was satisfied that both Dan and Roseline saw the appellant and the deceased arrive at Roseline's home on a motorbike, and that the appellant assaulted the deceased. The learned Judge discounted the possibility of a mistaken identity, as the appellant resides in the neighbourhood where the incident occurred, and was well known. Relying on Njoroge -vs- Republic [1993] KLR 197, the learned Judge held that it was not necessary for the prosecution to prove that the appellant was the one who inflicted the fatal blow, because as long as he participated in beating the deceased in association with the others, he was considered to have shared a common intention to kill the deceased. Further, that the injuries inflicted upon the deceased were consistent with the unlawful killing of the deceased, actuated by malice aforethought within the meaning of Section 206(a) of the Penal Code. The learned Judge therefore found the appellant guilty, convicted him, and sentenced him to death.

8. In support of his appeal, the appellant relied on a supplementary memorandum of appeal which was filed by his counsel Ms. Ofwa Vivian. In the grounds of appeal, the trial Judge was faulted for failing to consider the mitigating factors contrary to section 329 of the Criminal Procedure Code; failing to note that there was no dying declaration implicating the appellant; convicting the appellant on conflicting and contradictory evidence that was adduced by prosecution witnesses; convicting the appellant when he was not positively identified; relying on the evidence of prosecution witnesses that was not credible; failing to appreciate that the prosecution case was not established beyond reasonable doubt; and failing to find that the prosecution case was not proved to the required standard, or that the evidence was not sufficient to sustain the appellant's conviction.

9. The appellant relied on written submissions that were also prepared by learned counsel Ms. Ofwa Vivian, in which it was submitted that the deceased never made any dying declaration implicating the appellant, even though Richard and Roseline saw him, before he was taken to hospital; and that the prosecution evidence was contradictory. It was pointed out that Roseline was not a reliable witness as

she claimed that she was not able to see any injuries on the body of the deceased; that although Obondo said that the appellant was not carrying any weapon, Roseline alleged that the appellant used a metal rod as well as a stick, to assault the deceased, while Dan claimed that the accused used a stick.

10. In addition, it was submitted that the learned Judge erred in convicting the appellant relying entirely on the evidence of identification/recognition which was marred with error. Quoting Cleophas Otieno Wamunga -vs- Republic [1989] eKLR, the appellant submitted that the only sure way of identification would have been an identification parade to eliminate any possibility of error, and since this was not done, the possibility of the appellant having been mistakenly identified through genuine or honest mistake could not be ruled out. The appellant argued that although the death of the deceased and the cause of death was not disputed, no murder weapon that was in possession of the appellant was produced in evidence to substantiate that the claim that the deceased died as result of being hit on the head by the appellant; that the evidence pointed to the deceased having been killed by a mob; that Obondo confirmed the appellant's evidence that he was merely at the scene, but did not assault the deceased, and that he actually tried to stop the mob from assaulting the deceased; that there was no sufficient evidence as to who inflicted the fatal blow; and that PC Muragoli relied on witnesses evidence which was full of discrepancies.

11. In regard to malice aforethought, the appellant cited Charles Njonjo Gituru -vs- Republic [2019] eKLR, maintaining that there was no evidence regarding part of the body injured, or the type of injury inflicted upon the deceased, or the likely weapon used; and that no murder weapon having been recovered from the appellant, malice aforethought was not proved. Therefore, the learned Judge erred in convicting the appellant.

12. On sentence, the appellant submitted that the sentence imposed upon him was unconstitutional, as the Supreme Court in Francis Karioko Muruatetu & another -vs- Republic [2017] eKLR, held the mandatory death sentence is unconstitutional. It was submitted that the trial Judge did not consider the appellant's mitigation nor did he properly exercise his discretion in sentencing. The Court was therefore urged to set aside the sentence that was imposed upon the appellant and substitute it, or refer the matter to the High Court for resentencing.

13. In opposing the appeal, the respondent also filed written submissions prepared by Mr. Patrick Okango, Senior Principal Prosecution counsel in the Office of Director of Public Prosecution (ODPP). On the alleged contradictions, the respondent cited Joseph Maina Mwangi -vs- Republic [2000] eKLR, for the proposition that not all discrepancies or inconsistencies are fatal to the prosecution case; but only discrepancies that are of such gravity as to be prejudicial to the appellant. The respondent maintained that the contradictions, if any, alleged in the prosecution evidence, were so remote that they did not negate the fact that the deceased actually died from fatal injuries inflicted by the appellant and the mob; that the issue of the assailants having been purportedly paid was not relevant to the matter in issue, which was the identity of the persons who assaulted the deceased; that Obondo was called to the scene by Dan, and he arrived at the scene after the assault on the deceased; that the fact that the deceased was assaulted by a mob did not absolve the appellant, as the doctrine of common intent provides that each individual member of the mob is personally liable for the criminal acts of the entire mob; that the appellant was identified by both Richard and Roseline; and that there were no glaring inconsistencies or discrepancies in the testimony of the prosecution witnesses.

14. Further, it was submitted that the prosecution proved the case against the appellant to the required standard; that the deceased's death, and cause of death, were established by the evidence of the witnesses; that the appellant was properly identified as having been part of the mob that assaulted the deceased, and was therefore culpable in the crime; that there was no requirement for the murder weapon to be produced; and that there were no crucial witnesses who were not called to testify. Relying

on Ali Salim Bahati & another - vs- Republic [2019] eKLR, it was submitted that the appellant and the mob had a common intention, and caused the death of the deceased.

15. As regards sentence, the respondent, guided by the Supreme Court decision in Francis Karioko Muruatetu (2), conceded to the setting aside of the death sentence, and imposition of a term sentence. The respondent urged that a sentence of thirty years imprisonment be imposed on the appellant as it was necessary for the Court to demonstrate "that as a society governed by rule of law we must never allow people taking the law into their hands."

16. This being a first appeal, this Court has a duty to reexamine, and reanalyze the evidence that was adduced in the trial court in order to arrive at its own conclusion. In Mabel Kavati & another vs Republic [2014 eKLR, this duty was stated as follows:

> " This being a first appeal, it is our duty and the appellant is entitled to expect from us a fresh, thorough and exhaustive assessment, appraisal and analysis of all the evidence that was before the trial Court so as to reach our own independent conclusion on the guilt or otherwise of the appellants. See Rule 29(1) (a) of the Court of Appeal Rules which donates to us power to re- appraise the evidence and to draw our own inferences of fact.
>
> The principles upon which we exercise this jurisdiction have been repeated time and again by this Court in numerous decisions by its precedessor, the Court of Appeal for Eastern Africa and itself. We only need to sample a few to drive the point home. In Okeno versus Republic [1972] EA.32 the predecessor of this Court, had the following observation to make:-
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> > "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 versus Republic [1957] EA36) and to

17. In accordance with our duty as aforestated, we have carefully considered this appeal, the contending oral and written submissions, and the law. It is not disputed that the appellant died. It is also clear from the evidence of Dr. Ochieng, who performed the postmortem examination that the body of deceased had injuries on several parts including the head, and that the deceased died as a result of cardio respiratory arrest due to increased intercranial pressure caused by severe head injury.

18. The issue is whether the learned Judge properly considered and evaluated the evidence which was before him; whether the appellant was proved to have caused the death of the deceased; and if so, whether he had malice aforethought. To put it another way, the issue is whether the ingredients of the charge against the appellant were proved to the required standard. In considering that main issue, there are some subsidiary issues arising therefrom such as whether there were discrepancies and

inconsistencies in the evidence of the prosecution witnesses that were fatal to the prosecution case; and whether the appellant was properly identified as having assaulted the deceased.

19. Under Section 203 of the Penal Code, the ingredients of the offence of murder as described therein, are first, the fact that the deceased died; secondly, the cause of death of the deceased, and the fact that the death arose from an unlawful act or omission on the part of the accused person; and finally, proof that the unlawful act or omission was committed with malice aforethought.

20. As already observed, the death of the deceased and the cause of death were established. The deceased died as a result of injuries inflicted on him including a severe head injury. It was also common ground that the deceased was beaten by a mob, and that the appellant was present at the scene. This was clear from the evidence of the prosecution witnesses and the appellant's own defence. The question is whether the appellant participated in the assault against the deceased.

21. Both Dan and Roseline, testified that the appellant arrived at Roseline's homestead, carrying the deceased on his motorbike, with a group of people in two other motorbikes; and that they proceeded to beat the deceased demanding to know where the stolen cows were. This evidence was consistent with the evidence of Richard who heard the deceased screaming and upon going to the scene found the appellant assaulting the deceased using a metal rod and a stick.

22. Contrary to the appellant's defence that he did not participate in the assault, and in fact tried to assist the deceased, it is evident that he was in the group that came with the deceased and in fact took a lead role in the interrogation and assault of the deceased. Although the appellant sought to rely on the evidence of Obondo, who said that he was called to the scene and that he found the deceased tied and sitting down and did not see anybody beating the deceased, it is evident that Obondo arrived at the scene after the deceased had been beaten. He stated clearly that the deceased was tied up and was sitting down with blood oozing from his head. Obondo stated that at that stage, the appellant was preventing the other boys from beating the deceased. This does not necessary mean that the appellant had not earlier participated in the assault. We find that the appellant's defence was properly rejected by the trial Judge as it is evident that the appellant went to Roseline's home with the deceased, intending to make the deceased reveal where the stolen cow was, and in the process assaulted the deceased to make him talk.

23. We have no doubt that the deceased was beaten by a mob, and that the appellant was part of that mob, and played an active role. It may be difficult to identify who inflicted the fatal blow on the deceased's head. Nevertheless, Section 21 of the Penal Code states that:

> " When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

24. In Eunice Musenya Ndui -vs- Republic [2011] KECA 401 (KLR), this Court identified the following prerequisites that are all required to be present, in order to trigger the doctrine of common intention in section 21 of the Penal Code.

> " (i) There must be two or more persons.
>
> ii. They must form a common intention.
>
> iii. The common intention must be towards prosecuting an unlawful purpose in conjunction with one another.

iv. An offence must be committed in the process.

v. The offence must be of such a nature that its commission was a probably consequences of the prosecution of such purpose."

25. The appellant and the mob having taken the law in their hands, had a common intention of prosecuting an unlawful purpose, which was to forcefully make the deceased confess or reveal where the stolen cow was. In the prosecution of their common intention, they inflicted serious injuries on the deceased that resulted in his death. Therefore, the appellant and all the members of the mob are all deemed to have committed the offence.

26. Malice aforethought is defined under section 206 of the Penal Code 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."

27. The element of malice aforethought is a mental element of the offence. It takes the form of an intention to unlawfully cause the death of another person. This may be expressed malice or inferred malice aforethought. Inferred malice is where the intention to cause grievous harm or death is deduced from the injuries that are inflicted on the deceased, and the manner in which the injuries were inflicted. In the circumstances before us, the manner in which the deceased was assaulted, being beaten all over his body, with sticks and metal rods by many persons, it is clear that the appellant and the mob intended to cause grievous harm to the deceased, and that they knew that the deceased may suffer fatal injuries but they did not care. Consequently, malice aforethought may be inferred against the appellant and the members of the mob, under section 206(a)(b) and (c) of the Penal Code.

28. Coming back to the alleged contradictions in the evidence of the prosecution witnesses, it is correct that there were some inconsistencies in the evidence of the witnesses. For instance, regarding the number of people who were in the mob, Richard said, they were about thirty people, Dan said, they were about eleven people, while Roseline did not give any number. There was also inconsistency regarding the weapons that were used in beating up the deceased. Richard said, that the appellant was using a metal rob as well as a stick, while Dan described the weapon used by the appellant as a big stick and also mentions some metal rods, and Roseline said they were using slaps and sticks. The evidence of Roseline was also said to be inconsistent with the evidence of other witnesses as she was not able to identify any injuries on the body.

29. First, we note that the witnesses did not actually contradict each other, except that there were inconsistencies regarding what they said they saw. In Philip Nzaka Watu -vs- Republic [2016] eKLR, this Court stated:

> " However, it must be remembered that 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 renders it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

30. In our view, the contradictions and discrepancies regarding the weapons that were used by the appellant did not go to the root of the matter in question. It is evident that the appellant was beating the deceased and that at one time he used a stick, at another time he used a metal rod, and other times they used slaps. The apparent discrepancies in the descriptions given by the witnesses was a result of their recollection which may not necessarily be the same. Similarly, regarding the number of the people in the mob, it is clear that there was a commotion and the witnesses could only give an estimate which estimate depended on their imagination. Regarding the injuries, Roseline did not say there were no injuries on the deceased body. All she said was that she was not able to identify any injuries on his body.

31. We are satisfied that a reevaluation of the evidence on record shows that there was no inconsistency, contradiction or discrepancy that goes to the root of the prosecution case, in as much as there were some discrepancies, they were not material nor did they negate the prosecution case. Consequently, the appellant's conviction was safe as the evidence adduced was sufficient to prove the charge against him.

32. On sentence, the record shows that the learned Judge considered the appellant's mitigation, but imposed the death sentence because: "…the law prescribes only one sentence and that is death." The appellant was sentenced on 6th March, 2017, and the law was then as stated by the learned Judge. The jurisprudence regarding sentences for the offence of murder took a turn with the decision of the Supreme Court in Francis Karioko Muruatetu -vs- Republic [2017] eKLR, in which the Supreme Court held that the mandatory nature of the death sentence is unconstitutional. The respondent has rightly conceded the appeal against sentence. We do not find it necessary to remit this matter back to the High Court for resentencing as we have the appellant's mitigation on record, including the fact that he was remorseful.

    However, the offence of which the appellant was convicted is serious, and incidences of people taking the law into their hands must be discouraged. We therefore set aside the sentence of death that was imposed on the appellant, and substitute thereto, a sentence of thirty (30) years imprisonment.

33. The upshot of the above is that, the appeal against conviction is dismissed, but the appeal against sentence is allowed to that limited extent.

Those shall be the orders of the Court.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR