Mola & another v Republic (Criminal Appeal 125 of 2017)
[2024] KECA 1652 (KLR) (15 November 2024) (Judgment)

Neutral citation: [2024] KECA 1652 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 125 OF 2017

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

NOVEMBER 15, 2024

BETWEEN

PIUS ABIERO MOLA ..... 1ST APPELLANT

BOAZ OTIENO ABIERO ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Migori (Mrima, J) dated 12th June, 2017 in HCCR Case No. 16 of 2015)

JUDGMENT

1. Pius Abiero Mola (1st appellant), Boaz Otieno Abiero (2nd appellant), together with one George Oligi Jerim (Jerim), were arraigned before the High Court at Migori, for the offence of murder, contrary to Section 203 as read with Section 204 of the Penal Code. The information signed by the prosecution counsel for the Director of Public Prosecutions (DPP) stated that on the 23rd day of October 2012 at Amayo Sub Location within Migori County they jointly murdered Odada Achieng (Deceased).

2. Jerim died during the pendency of the trial. Although no formal order was made in the proceedings, the case against him apparently abated.

3. During the trial, six witnesses testified for the prosecution in the following order: John Omolo Ochieng (Omolo), who on material day was ploughing a disputed farm, which according to him, belonged to his brother, the deceased; Jared Owuonda Ochieng (Owuonda), another brother to the deceased, who was also ploughing with Omolo; Dr. K'ogutu Vitalis Owuor (Dr K'ogutu, who carried out an autopsy on the body of the deceased; Charles Moriasi Osebe (Osebe), the then District Land Adjudication and Settlement officer for Migori and Nyatike Sub-counties, who participated in the adjudication processes involving the disputed land; Johanna Arare Ochieng (Arare), a brother to the deceased, who identified the body for postmortem examination; and Corporal Joseph Kitaka (Cpl Kitaka), a police officer from

who visited the scene and later rearrested the two appellants and Jerim, at Macalda Police Station where they had surrendered. The 1st and 2nd appellants each gave unsworn statements in their defence and did not call any witnesses.

4. Upon considering the evidence for the prosecution and the appellants defence, the High Court (Mrima J), found that the death of the deceased was proved to have been caused by cardiac arrest arising from a stab injury to the heart; that there was evidence from Omolo and Owuonda that the witnesses and the appellants were neighbours and had been involved in several disputes over the disputed farm; that the witnesses knew the appellants well; and that the appellants did not deny being on the disputed land on the material day, but admitted having seen Omolo, Owuonda and Arare at the scene. The learned Judge accepted the evidence of Omolo and Owuonda that they saw the 1st appellant spear the deceased on the chest; found the identification of the two appellants by Omolo and Owuonda free from error; and concluded that the appellants were among the persons who jointly attacked the deceased, which attack led to his death.

5. On malice aforethought, the learned Judge relying on this Court's decision in Joseph Kimani Njau vs R [2014] eKLR; and Mary Wanjiku Gitonga -vs- R (Nyeri Cr Appeal No 83 of 2007(UR); noted that there was evidence of sustained acrimony between the family of the appellants and that of the deceased. That the appellants went to the disputed land armed with spears and pangas, their mission being to have the family of the deceased leave the disputed land, or to kill those working on the disputed land; and this coupled with the nature of the weapon that was used to attack the deceased who was unarmed, provided a clear manifestation of malice aforethought on the part of the appellants. The learned Judge therefore found the appellants guilty of the offence of murder, convicted them of the charge, and sentenced each to suffer death.

6. Aggrieved by the judgment of the High Court, the appellants have filed this appeal. In their joint memorandum of appeal, the appellants raised four grounds, faulting the learned judge for erring in failing to appreciate that the prosecution had not established their case beyond reasonable doubt; in convicting the appellants without proper identification; in failing to acknowledge and appreciate the glaring contradictions in the prosecution case; and in failing to consider the appellants' mitigation, and passing a sentence which was manifestly harsh.

7. In support of the appeal the appellants have filed written submissions in which they submit inter alia, that they were not positively identified by the prosecution witnesses; that Omolo and Owuonda who are alleged to have identified them gave contradictory testimony on exactly who speared the deceased; and that they mentioned some people who were not charged, and this created doubt in the prosecution case. In addition, that the evidence of Omolo was that of a single identifying witness who could have been honestly mistaken; that consequently, there was need for corroboration of Omolo's evidence; that there were other people who were said to have been present in neighbouring farms, yet they were not called to testify; and that there was contradiction as to whether the disputed land was ancestral land belonging to Omolo and his family.

8. The appellants relied on R -vs- Turnbull & Others [1976] 3 All ER 549 and Wamunga -vs- Republic [1989] KLR 424, contending that they were not positively identified by the prosecution witnesses. In addition, the appellants submitted that the prosecution did not establish the ingredients of the offence of murder under section 203 of the Penal Code as they failed to prove who caused the death of the deceased, and that the prosecution evidence was riddled with contradictions and inconsistencies including the blood on the spear that was produced not matching the sample of the deceased's blood.

9. On malice aforethought, the appellant's submitted that there was no proof that they had any grudge with the deceased or any motive to kill the deceased, and therefore they could not have caused the

death of the deceased. They dismissed the alleged land dispute, maintaining that the same was not substantiated as no documents were produced in support of the same.

10. In addition, the appellants argue that Omolo and Osebe mentioned totally different parcels of land which were said to be in dispute, and referred to different people whom they said had interest in the said parcels. They argued that from testimonies of Omolo and Osebe, there was no mention of the appellants in the alleged land disputes. The appellants, therefore, argued that malice aforethought was not established.

11. On the sentence, the appellants faulted the learned Judge for failing to consider their mitigation and passing a sentence which was manifestly harsh. They pointed out that section 204 of the Penal Code provided a mandatory death sentence which denied the appellants the right to mitigation. They urge the Court to exercise its discretion and pardon the accused persons as they were very remorseful and should therefore be given a non-custodial sentence. The appellants cited the Supreme Court decision in Francis Karioko Muruateru & Another -vs- Republic & 4 Others, Petition No. 15 of 2015, in support of their submissions on sentence.

12. The respondent also filed written submissions through Mr. Ikol Esaba, Assistant Director of Public Prosecutions. Submitting on the first and second grounds of appeal relating to the identity of the appellants, the respondent maintained that the identity of the appellants as among the persons who murdered the deceased, was not in doubt as the offence was committed during day time and they could be clearly seen. Moreover, Omolo and the 1st appellant had a conversation, Omolo informing the 1st appellant that they were not barred from ploughing the disputed land, as the matter was in court, and thus it was clear that Omolo knew the 1st appellant before the fateful day, and the issue of identification did not arise because Omolo recognized the 1st appellant as Pius Abiero. Owuonda also similarly knew the 1st appellant and recognized him.

13. The respondent submitted that Omolo testified and explained how the 1st appellant distributed spears to his colleagues, before he advanced, and speared the deceased; that Regan, a son to the 1st appellant, also speared Omollo, when Omollo confronted 1st appellant; and that Omolo was able to clearly identify the assailants. In addition, Owuonda also identified the 1st appellant as having been among those who attacked them, and that he recognized the 1st appellant as he was his neighbor. He also similarly recognized the 2nd appellant who was at the scene.

14. On the issue of contradiction, the respondent submitted, that if there was any contradiction, it was not material as it did not go to the substance of the case. The respondent relied on Joseph Maina Mwangi -vs- Republic (Criminal Appeal No. 73 of 1993), for the propositions that the minor contradictions were not fundamental as to cause prejudice to the appellants.

15. On malice aforethought, the respondent submitted that under Section 206 of the Penal Code, this could be inferred by the fact that the 1st appellant speared the deceased on the chest, and that he intentional and strategically aimed at the heart showing that the intention was to harm and to kill; and in addition, the 1st appellant had warned the witnesses of his intentions telling them that if they wanted to die, they should continue ploughing. The respondent argued that all the appellants had a common intention, which was to kill or cause grievous harm to the deceased. The respondent therefore argued that the prosecution case was solid and the appellants' conviction was safe.

16. Finally, on sentence, the respondent submitted that the appellants deserved the maximum sentence that is provided by law for the offence of murder, given the circumstances of the attack on the deceased which was vicious. The respondent submitted that the death sentence was legal and the appellants had not shown any reasonable ground for this Court to interfere with the sentence. The respondent

reiterated that the appellants were given a chance to mitigate and that their mitigation was considered before they were sentenced in accordance with the law.

17. This being a first appeal, this Court is mindful of its duty as the first appellate court. This duty was well articulated by this Court in Erick Otieno Arum vs Republic [2006] eKLR as follows:

> " It is now well settled, that a trial court has the duty to carefully examine and analyze the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. 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 analyze 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. We have considered the record of appeal, the parties' submissions, the authorities cited and the law. In our view, the issues that fall for this Court's determination are: whether the prosecution's case was marred by discrepancies and contradictions; whether the offence of murder was proved to the required standard; and whether the sentence meted out to the appellants was manifestly harsh and excessive.

19. Section 203 of the Penal Code, under which the appellants were charged, sets out the necessary ingredients for proof of the offence of murder. It provides that:

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

20. In determining whether the prosecution proved its case beyond reasonable doubt, it is essential that the ingredients for the offence of murder as specified under section 203 of the Penal Code, are established. The ingredients required to be proved are the death of the deceased; that the appellants committed an unlawful act or omission that led to the deceased's death; and that the act or omission was committed with malice aforethought. These principles were stated by this Court in Kimani v Republic [2024] KECA 615 (KLR) as follows:

> "There are three elements that the prosecution must prove beyond reasonable doubt in order to secure a conviction for the offence of murder under Section 203.
>
> They are (a) the death of the deceased and the cause of that death; (b) that the accused caused the death of the deceased and (c) that the accused had malice aforethought. (See-Nyambura & Others vs. Republic [2001] KLR 355)."

21. It is not disputed that both Omolo and Owuonda were first-hand eyewitnesses to the murder of the deceased, whom they referred to as Odada Ochieng, and was said to be known also as Mariko Opiyo. Both testified that the deceased was stabbed on the left side of the chest with a spear. Their evidence was consistent with the postmortem report which identified the cause of death as cardiac arrest due to stab injury to the heart. The report concluded that a sharp object caused the fatal injury, which, was consistent with the evidence of Omolo and Owuonda, that the deceased was speared on the chest. The evidence of Omolo and Owuonda, and the postmortem report, confirm that the death of the deceased occurred.

22. On identification, both appellants were placed at the scene of the crime by Omolo and Owuonda. In his evidence, Omollo told the court that while ploughing, the 1st appellant ordered them to stop, and when that did not happen, he left, went into a nearby bush, collected some spears and pangas, and

distributed them to his accomplices, after which the 1st appellant advanced and speared the deceased on the chest, and the deceased fell down. The evidence of Omollo is consistent with the evidence of Owuonda who was also at the scene, and saw the 1st appellant collecting and distributing the spears, but the evidence of the two witnesses differed on who speared the deceased. Owuonda's evidence was that the deceased was speared by Jerim (whom he referred to as Sammy Oligi), while Omollo maintained that it was the 1st appellant who speared him. To this extent there was contradiction in the evidence, and we shall address this shortly.

23. Suffice to state that the evidence of the two eye witnesses, in regard to the death of the deceased, is consistent with the evidence of Cpl Joseph Kitaka, who testified that he visited the scene of the incident and saw the body of the deceased which had a deep cut on the left side of the chest; that he recovered a blood-stained spear from the scene; and that he rearrested the 1st appellant, 2nd appellant and Jerim from Macalder Police Station, where they had surrendered.

24. On contradictions, we reiterate what this Court stated in Erick Onyango Ondeng' vs R, [2013]:

> "As noted by the Uganda 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. As the court put it:
>
> 'With regard to contradictions in the prosecution's case 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.'"

25. The alleged discrepancies concerning the parcel numbers of the disputed land, and the names of proprietors of the aforementioned parcels of land, are not fundamental nor do they affect the substratum or the main issues before the Court. In addition, there were inconsistencies regarding the names of the witnesses and that of Jerim. However, the inconsistencies in the names did not have any effect, as it was possible to deduce from the evidence, who was being referred to.

26. As regards who speared the deceased, both Omollo and Owuonda testified that they knew the 1st appellants as a neighbour before the incident. They were able to see and identify the 1st appellant by recognition, as the incident happened during day time. There was no possibility of a mistaken identity since the case rested on recognition as opposed to identification. In Anjononi & others v R (1976-80) 1 KLR this Court stated:

> " Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another."

27. Omollo was also able to identify the 2nd appellant, Jerim and one Reagan, as having participated in the assault. Although Owuonda did not know the other assailants before the incident, he saw them in broad daylight and testified that the 1st appellant and Jerim both participated in assaulting the deceased. We are therefore satisfied that the appellants were properly identified as having all participated in the assault. The learned Judge believed and accepted the evidence of Omollo that it was the 1st appellant who speared the deceased. Be that as it may, and the contradiction regarding who caused the fatal injury on the deceased, notwithstanding, it is evident that the 1st appellant 2nd appellant, Jerim and Reagan, were all acting in concert, and had a common purpose.

28. The common purpose was to remove the deceased and his brothers from the disputed farm, even if this meant causing death to any of them. Therefore, it did not matter who inflicted the fatal injury, as under Section 21 of the Penal Code, they are all deemed to have committed the offence, which resulted from their common purpose. That section states as follows:

> " 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."

29. Section 206 of the Penal Code defines malice aforethought 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. the 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. Malice aforethought was succinctly discussed by this Court in Nzuki v R [1993] KLR 171 wherein the Court rendered itself as follows:

31. In R vs Tubere S/O Ochen (1945) 12 EACA 63 the former Eastern African Court of Appeal, identified the importance of considering the weapon used, and the part of the body injured, in determining whether malice aforethought could be inferred, and concluded that:

> " 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..."

32. In Bonaya Tutu Ipu & Another vs R [2015] eKLR, this Court (differently constituted) stated:

> "It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of Chesakit V. Uganda, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining in 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. In the instant appeal, a pertinent question is whether there was sufficient evidence on record to establish that the appellants intended to cause the death of the deceased or cause him grievous harm. The record shows that bad blood existed between the deceased and the appellants over the disputed

land. Both Omollo and Owuonda, stated that the 1st appellant ordered them to stop ploughing the land, and warned that if they wanted to die, they should continue ploughing the land. As if to demonstrate what he meant, the 1st appellant collected spears and pangas from a bush and distributed them to his colleagues. Clearly, the appellants' actions were not only premeditated but also well planned. The fact that they had lethal weapons, such as spears and pangas, which they used on the deceased who was not armed, showed that they intended to inflict grievous harm or kill the deceased.

34. Further, a perusal of the post-mortem report indicates that the deceased died as a result of a stab wound in the chest. The spear was aimed at the deceased's chest, where it penetrated the heart, a very vital and delicate organ of the human anatomy. It is not rocket science that a penetrating wound of the chest caused by a sharp object would lead to a heart injury and instant death. The appellants' intentions to kill the deceased was discernable from the circumstances in which the deceased was attacked and the weapon used, we are in agreement with the trial judge that the assault was premeditated and intentional. We find that under section 206 (a) and (b) of the Penal Code, malice aforethought is deemed to have been established. We find that all the ingredients of the offence of murder were proved. The conviction of both appellants was therefore safe, and the appeal against conviction is dismissed.

35. As regards sentence, the appellants complained that while sentencing them, the trial judge failed to consider their mitigation and as a result, rendered a harsh and excessive sentence. A perusal of the record of the trial court reveals that the appellants offered their mitigation through learned counsel Mr. Jura, who represented them during the sentencing hearing. This is what Mr. Jura stated:

> The first accused is pleading for mercy as he is a family man in a polygamous marriage with 9 nine children including the second accused person [who is his firstborn]. The second accused is a young man, married with a wife and child. He is still young and productive. The sentence is not mandatory and I urge this court to exercise discretion and pardon the accused persons as to a non-custodial sentence. They are remorseful that the deceased died under those circumstances. They still plead innocence.

36. And this is how the learned Judge responded:

> the accused persons were convicted of the offence of murder. Section 204 of the Penal Code prescribes the sentence upon conviction on the charge of murder as death. I am not convinced that the word shall therein can be interpreted to mean any other than mandatory. I hereby sentence each of the accused persons to suffer death as per law provides.

37. The remarks show that the learned Judge did not consider the appellant's mitigation, as he felt constrained by the sentence provided under section 204 of the Penal Code, which in his view was a mandatory sentence. This is how the law stood as at the time the learned Judge was sentencing. However, the Supreme Court in Francis Karioko Muruatetu & Another [2017] eKLR changed that position when it held that the mandatory nature of the death sentence as provided under Section 204 of the Penal Code, is unconstitutional, as it deprives the trial court of its unfettered jurisdiction to exercise discretion and impose appropriate sentence, depending on the circumstances of the particular case in a murder trial. As the law stands now, when sentencing, a court has to consider an accused person's mitigation, and impose an appropriate sentence, taking the mitigation and the circumstances of the case into account. For these reasons we allow the appeal against sentence, and set aside the sentence of death that was imposed upon each appellant.

38. Taking into account the appellants mitigation as stated before the trial Judge, and taking into account the vicious attack upon the deceased, we find a sentence of life imprisonment to be appropriate. Accordingly, we substitute a sentence of life imprisonment upon each appellant. Further, in accordance

with our decision in Evans Nyamari Ayako vs. Republic - Kisumu (Court of Appeal) Criminal Appeal No. 22 of 2018, that the indeterminate nature of life imprisonment contravenes the provisions of Article 27 of *the Constitution*, we translate the life sentence imposed on each appellant to a term sentence of 30 years' imprisonment.

39. Consequently, we dismiss the appeal against conviction, but allow the appeal against sentence to that limited extent.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 15TH 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

.....

JUDGE OF APPEAL

I certify that this isa true copy of the original

DEPUTY REGISTRAR