



**Ogolla v Republic (Criminal Appeal 34 of 2019)
[2024] KECA 1654 (KLR) (15 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1654 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 34 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
NOVEMBER 15, 2024**

BETWEEN

DENNIS OMONDI OGOLLA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Kisumu
(T.W. Chereere J.) dated 10th December 2018 in HCCRC No. 19 of 2016)*

JUDGMENT

1. Dennis Omondi Ogolla (the appellant herein), 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 were that on 24th April at Kakola Location, Nyando sub county within Kisumu County he murdered David Luci Onditi (the deceased). The appellant was tried and convicted of the offence and sentenced to 30 years imprisonment. Being dissatisfied and aggrieved with both the conviction and sentence, the appellant has now appealed to this Court.
2. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a first appeal, this Court is mindful of its duty as 1st 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 analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. 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 analyse 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.”

3. The evidence before the High Court was as follows: Ronald Owino Ochome, PW2, testified that on 24th April, 2016 at about 7.30pm, his sister, Victoria, made a distress call to his wife and he rushed to her house which was about 100m away. Before he got there, he saw a crowd gathered outside his cousin-brother’s (the deceased’s) house and was informed that the deceased had been attacked for allegedly stealing a motorcycle. PW2 moved closer and saw the deceased kneeling down surrounded by the crowd; he had injuries on his body; and the appellant was identified as the owner of the motor cycle alleged to have been stolen. The appellant demanded to be paid for his stolen helmet and broken side mirror. PW2 also stated that the deceased had previously alleged that the appellant was having an affair with the deceased’s wife.
4. PW2 tried to rescue his cousin-brother but the mob attacked him and he ran for his life and locked himself in his sister’s house. After a while when he eventually came out, he found the deceased had been beaten and was barely alive. PW2 took the deceased to the hospital where he died the following day. On cross examination, PW2 stated:

“The incident occurred at 7,30 pm. It had been raining heavily. It was dark...I saw accused strangle the deceased with a steel pot holder (kamata...) On the date deceased was being beaten he identified the accused as the one who was having an affair with his wife...I confirm that David (deceased) had taken accused’s motor bike.... David told me he did not steal accused’s motor cycle. David said accused had gone to his house with his motor bike and when deceased found accused with his wife accused alleged that the deceased had stolen his motor Bike. David told me that he had quarrelled with accused when he found accused in his house and they fought. The accused ran away and lied to other motor bike riders that deceased had stolen the motor cycle....)”
5. Victoria Adhiambo Omoche, PW3, the deceased’s cousin testified that the deceased called her to his house at around 7pm on 24th April 2016, saying he had found the man who was having an affair with his wife, inside his house. She accompanied the deceased back to his house, and found the appellant standing outside the house with the deceased’s wife Sharon. A motor cycle was also parked outside the house. The deceased told his wife that he was ready to hand her over to the appellant, but they should go to the police station. PW3 testified that the appellant then made a call claiming he had found the person who had stolen his motor cycle; and shortly several boda boda riders arrived at the scene and beat the deceased senseless on the allegation that he had stolen the accused’s motor cycle. She stated:

“I arrived at the scene about 6.30 pm and found accused at the scene. Accused slapped David and said he had stolen his motorcycle. The crowd set upon David after he was alleged to have stolen accused’s motor cycle. Accused was using a pot holder to beat David on the head and other body parts. When I snatched the holder from accused the crowd set upon me and beat me up.”
6. Upon being attacked, after attempting to rescue the deceased, PW3 ran to her house for safety; and from where she called her neighbour, Teresia, who in turn called PW2. PW3 identified the appellant as the one that called the crowd that attacked the deceased and that she saw him beat the deceased with a steel pot holder.
7. Dr. Mary Nayama, PW1, produced the medical report on behalf of Dr. Mboya, (PEXH 1) who performed the post mortem at Jaramogi Oginga Odinga Teaching and Referral Hospital, observed that



the deceased had extensive injuries especially on his head and the cause of death was due to bilateral subdural hematoma secondary to blunt force trauma to the head.

8. The appellant, in his sworn defence, denied the offence, saying he did not even know the deceased; or the deceased's wife Sharon, nor did he claim that the deceased had stolen his motorcycle; that he was a boda boda rider. He claimed that on 24th April, 2016, he was arrested when he went to Ahero Police Station to report theft of his motorcycle which had been stolen from one Eric Omondi whom he had given the motorcycle to ride.
9. The trial court, having considered the totality of the evidence, was satisfied that the ingredients of the offence of murder had been satisfactorily met. The court noted that the fact and cause of death was not in dispute; that it was also not in dispute that the deceased succumbed to injuries inflicted following an assault by the appellant; and that PW2 and PW3 all observed multiple injuries on the deceased's body. The learned judge pointed out that the said injuries were also confirmed upon the post-mortem performed by PW1.
10. The trial court was also satisfied that the testimony of PW2 and PW3 placed the appellant at the locus in quo at the time the act was committed; and was clear that it was the appellant who caused the unlawful act which caused the deceased's death, and PW2 and PW3 were able to identify the appellant hit and strangle the deceased with a steel pot holder. PW3 also identified the appellant as the one who made a call to the mob that subjected the appellant to 'brutal thrashing'. The trial court with regard to the appellant's defence was convinced that the appellant was put at the scene by the evidence of PW2 and PW3, whose respective testimony was more less the same.
11. The trial court also noted that although the deceased may have succumbed to the injuries inflicted by the mob, the appellant was clearly seen by PW2 and PW3 assaulting the deceased. The appellant was also identified as the one who made the call for the mob who responded, and attacked the deceased, causing his death constituting actus reus.
12. As to whether the entire incident was a matter of mob injustice by unknown persons, the learned judge considered this and stated as follows:

“The deceased may have succumbed to injuries inflicted severally by different self-appointed executioners but the accused also assaulted him. He too was a part of the mob, and is equally guilty of committing the unlawful act”.
13. As regards the issue whether the injuries were inflicted with malice aforethought, the learned judge considered the definition as discussed in several cases including *Nzuki vs. Republic* [1993] KLR 171 and (b) in the case of *Daniel Muthee vs. Republic*, Criminal Appeal No. 218 of 2005 (UR) cited in the case of *Republic vs. Lawrence Mukaria & Another* [2014] eKLR, which includes inter alia the manner in which the assault is executed, the weapon used, the targeted part of the body to lead to a reasonable conclusion that the person accused would have known the consequences of their action; and the learned judge was satisfied that the appellant masterminded the attack on the deceased; and alongside others, inflicted the injuries that led to the death of the deceased; that from the severity of the attack, there was no doubt that their intention was to cause the deceased grievous harm if not death.
14. Having considered all the evidence in its totality, the trial court found the prosecution evidence was overwhelming and effectively dislodged the appellant's defence as to justify a finding that the appellant was guilty of the offence as charged; and sentenced him to 30 years' imprisonment.
15. The appellant has raised 5 grounds in the memorandum of appeal contending that the trial court failed: to consider that there was no direct evidence linking him to the offence; to appreciate that malice



- forethought was not established; to appreciate that the deceased was assaulted by a mob; to appreciate that the whole burden was shouldered on him simply because he was the complainant of the stolen motorcycle; to find that the trial court imposed on him a manifestly harsh sentence which was not commensurate to the gravity of the alleged offence; and to find that his defence statement was not given due consideration despite the fact that the same was not shaken by the prosecution evidence.
16. In the supplementary memorandum the appellant raises two grounds which basically condense his initial grounds of appeal, that the learned judge erred in law in finding that the case against him was proved beyond reasonable doubt; and he seeks refuge in the provisions of article 165(3)(a) (b), 159(2) (a)(b) and 22(4) of *the Constitution* of Kenya 2010 pegged to the Supreme Court decision in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR.
 17. On the first ground the appellant submits that PW2 and PW3 did not positively identify him, as the incident occurred at around 7.30pm, when it was dark and raining; that none of them gave a description of his physical appearance, or what aided them to see and identify him given the conditions that were prevailing. We cannot fault the appellant's argument regarding the absence of detailed description as to how the witnesses were able to see and identify him. Yet from the evidence on record, we pose the question as to whether the prosecution case was hinged solely on physical identification.
 18. From the evidence on record, the deceased called PW3 to his house and identified the appellant as the one who had an affair with his wife, Sharon. In this Court's view, PW3, despite not having earlier known the appellant, was able to make positive identification as the deceased was showing her the person whom his wife had been having an affair with, a fact that PW3 was aware about and as such the appellant became a person of interest. PW3 spent some time in the presence of the appellant even as the appellant made a call and suddenly, a crowd of boda boda riders appeared and started assaulting the deceased.
 19. The evidence of PW2 who also confirmed that the deceased had previously lamented to him about an extra marital affair between this wife and a boda boda rider; and when he got to the scene, the deceased confirmed to him that he was the 'rival' he had complained about. The appellant in his defence admits to being a boda boda rider, confirming the narrative by PW2; and that he had complained about his stolen motorcycle which in our view links the appellant to the call that brought the mob to assault the deceased. PW2 and PW3, at different intervals, also saw the appellant hit and strangle the deceased with a steel pot holder; and the medical report corroborates this in its finding that the cause of death was bilateral subdural hematoma secondary to blunt force to the head.
 20. It is our finding that the evidence of the eye witnesses is clear that the deceased was beaten by a mob instigated by the appellant after he was found with the deceased's wife, and that the appellant also participated in the assault. The appellant and the mob had a common purpose, and regardless of who dealt the fatal blow, they are all deemed to have committed the offence.
 21. The appellant also complained that the weapon was not produced in court. This Court has held severally that it is not fatal to the prosecution case if the murder weapon is not produced. For instance, in *Ekai vs. Republic* (1981) KLR 569 this court rejected the argument that failure to produce the murder weapon is in itself fatal to a conviction. In that case the Court found that even though the murder weapon had not been produced, the post mortem examination had established beyond all reasonable doubt that the fatal injury had been caused by a sharp weapon. Also see *Karani vs. Republic* (2010)1 KLR 73 at page 79 & *Ramdahan Kombe vs. Republic* CR.A No. 168 of 2002-MSA).
 22. This Court is satisfied and agrees with the trial judge's finding that the appellant was placed at the scene, and from the evidence on record there is no other plausible version of how the deceased was killed or by whom.



23. On malice aforethought, we have re-evaluated and re-analysed the testimonies of PW2 and PW3, which remained unshaken even on cross-examination; and any discrepancies which may have arisen such if at all, were not substantial, as it remained a fact that the deceased was badly beaten. We also consider the appellant's actions against the deceased, to find that malice aforethought was established, and in this regard, we share the very observations made by this Court in *Omar vs. Republic* (2010) 2KLR 19 that:

“So by the appellant hitting the deceased on the neck with a bottle, he must have intended to cause her at least grievous harm. Indeed, the blow using a bottle caused a fatal wound on the deceased. The evidence clearly shows the appellant had the necessary malice aforethought.”

24. This Court is, therefore, satisfied that the parameter of conviction was met by the High Court; and was sound.

25. On sentence, the appellant submitted that the death sentence was unconstitutional drawing from past jurisprudence grounded on the *Muruatetu* decision. With regard to the severity of sentence, section 379 (1)(a) &(b) of the Criminal Procedure Code provides for this Court's jurisdiction to entertain an appeal against sentence from the High Court.

In *Francis Muruatetu & Another vs. Republic*, the Supreme Court of Kenya Petition No. 15 & 16 of 2016, the court gave sentencing guidelines with regard to mitigation before sentencing in murder cases at paragraph 71 as:

- a. Age of the offender,
- b. Being a first offender,
- c. Whether the offender pleaded guilty,
- d. Character and record of the offender,
- e. Commission of the offence in response to gender- based violence,
- f. Remorsefulness of the offender,
- g. Any other relevant factor.

26. In the same case the court in regard to the application of mitigation by the accused before sentencing held as follows:

“it is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or in the converse impose the death penalty.”

27. This Court, in *Chai vs. Republic (Criminal Appeal 30 of 2020)*[2022]KECA 495 (KLR), held that the two holdings of the Supreme Court in the *Muruatetu* case make it very clear and underscores the importance of receiving and considering mitigating circumstances, and also of applying applicable sentencing guidelines, even though the latter are a guide. From the record, this Court finds that the trial court followed the guidelines set out by the Supreme Court with regards to mitigation, called for the victim impact statement and weighed it against the circumstances surrounding the offence. In so doing the trial court used its discretion in making an informed decision with regard to sentencing. To that end we find that this appeal lacks merit and upholds the judgment of the High Court and we therefore affirm the sentence of 30 year imprisonment; and dismiss the appeal in its entirety



DATED AND DELIVERED AT KISUMU THIS 15TH DAY OF NOVEMBER, 2024.

HANNAH OKWENGU

JUDGE OF APPEAL

H. A. OMONDI

JUDGE OF APPEAL

JOEL NGUGI

JUDGE OF APPEAL

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

Deputy Registrar

