**Mulefu alias Museveni & another v Republic (Criminal Appeal 168 of 2018) [2024] KECA 1585 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1585 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**CRIMINAL APPEAL 168 OF 2018**

**HM OKWENGU, HA OMONDI & JM NGUGI, JJA**

**NOVEMBER 8, 2024**

**BETWEEN**

**ERNEST OJIAMBO MULEFU ALIAS MUSEVENI ..... 1ST APPELLANT**

**STEPHEN WANDERA MULEFU ALIAS MZEE PUNDA ..... 2ND APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the Judgment of the High Court of Kenya at Busia (Tuiyott, J.) dated 16th August 2016 in HCRC No. 35 of 2010)***

## JUDGMENT

1. Ernest Ojiambo Mulefu alias Museveni (the 1st appellant) and Stephen Wandera Mulefu (the 2nd appellant) were charged with two counts of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the night of 6th and 7th February 2010 at Nangoma Village, Matayos Division within Busia County jointly with others not before the court, murdered Agaitano Babu Ochieno.

2. The second count was in respect to the murder of Silvester Ojanji alleged to have happened at the same time and place. The appellants were tried and convicted of the offence, and sentenced to death in count 1 with count 2 being held in abeyance. Being dissatisfied and aggrieved with both the conviction and sentence, the appellants have now filed this appeal.

3. This being a first appeal, this Court is mindful of its duty as 1st appellate court, as 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."

4. The prosecution called a total of 10 witnesses to prove its case. Events building up to this incident, seems to have begun on 4th February 2010, when the 1st appellant accompanied by a squad of about 16 people, confronted PW1 Paul Wanyama Almidi with a declaration that Clement Peter had lost some cows; and that the latter had consequently sent some people to kill him. They demanded that PW1 accompany them to the home of Sylvester Ojanji, the 2nd deceased, and upon failing to get the latter, they assaulted PW1, inflicting injuries which necessitated two nights admission on hospital.

5. Upon PW1's return home on 6th February 2010 after being discharged from hospital, he was visited by the deceased persons at around 5.30pm; and they left at around 6pm; and PW1 went to sleep. At around 8pm he heard a knock on the door and before he could open the door, it was forcefully opened and intruders got in, among them was the 1st appellant. They immediately started whipping him using whips known as nyaunyo. The 1st appellant asked him for his mobile number and dialed it; and when it rang the 1st appellant took the phone away. The intruders then forced the witness to accompany them to the house of Agaitano Babu Ochieno, the 1st deceased. The witness was able to recognize the appellants by their voices and also saw them by aid of moonlight as they walked to look for the 2nd deceased.

   Moreover, the appellants are uncles to PW1, and he had known them since childhood.

6. Upon reaching the home of the 1st deceased, the appellants and their companions knocked down the door and ejected the 1st deceased, with the 2nd appellant tying the hands of the 1st deceased to PW1 using a rope. They set off to the home of one Protus Sombi who was forced out of the house joining the 1st deceased and PW1. The 1st appellant had a panga, while the 2nd appellant had a whip, other members had sticks, spears and an axe, and they assaulted the 1st deceased. They were then taken to the home of Rosemary Onyango, the 1st wife to the 2nd deceased, but the latter was not there. The intruders then took the 1st wife of the 2nd deceased to the home of Namakoda, the 2nd wife, where the 2nd deceased was, but he refused to open. The squad broke down the wall of the mud house and the 2nd deceased took off running but the assailants caught up with him tying him up with the others.

7. The captives were taken to St. Eugene School Nangoma where they were assaulted. PW1 was cut several times on the forehead and limbs, resulting in a fracture to his jaw and wounds on many parts of his body. The assailants then proceeded to inflict fatal wounds on the deceased persons, who were left for dead.

8. PW4 Roselyn Ndeda Babu, the wife of the 1st deceased testified that she was at home with the deceased on the night of 5th February 2010, when at about 10pm some people knocked and forcefully opened the door. The house was lit by a tin lamp and she was able to see the two appellants and one Clement Busanya; she recognized the 1st appellant as he had been a member of Mudanya Primary School Committee that she too belonged to; she also recognized the 2nd appellant as he used to ferry water using a donkey. It was her evidence that the two appellants were armed with a stick and panga; and each of them carried a torch, and were in the company of 20 other people; that the 1st appellant entered the 1st deceased's bedroom and dragged him out while the other inspected the house using torch light. The 1st deceased was then taken away. After they left the witness took the children to the mother in law, and when she returned with her mother in law at about 6 am, she heard screams; and on heading towards direction of the screams at Nangoma, they found the mutilated bodies of the deceased persons.

9. Jenta Atieno Okumu, PW3 the 1st deceased's mother testified that she heard bangs on the doors and windows of the house of the 1st deceased, as they shared a live fence. When she went to find out what was going on she saw torch lights in the 1st deceased's compound, and as the torches moved away from her son's home, she heard him call out to her in distress, even as the squad declared to the 1st deceased that "utalilia kichinjio" (You will cry at the slaughter house.) The witness then ran to the house of her other son, Patrick Ouma, and alerted him; thereafter she took cover in the bushes and could hear and recognize the voice of the 2nd appellant as he urged one of his companions named Boi to accompany him cut a rope. She had known the 2nd appellant since his childhood. After the squad left, she returned home and at daybreak she found that her son and the 2nd deceased were dead.

10. PW5 Rosemary Anyango Ojanji, the wife to the 2nd deceased testified that on the night of 6th February 2010 at around midnight she was alone when she heard a bang on the door and she was ordered to open the door, and ten people entered and started assaulting her. The intruders asked where her husband was, and she told them he was at her co-wife's home. With the aid of torch lights which illuminated the house, the witness was able to recognize 3 of the intruders as the appellants and Clement Musanya. The intruders forced her and her son Tobias Ochola to accompany them to her co-wife's home. At the co-wife's home the intruders forced out the 2nd deceased whom they took away. Later in the morning at around 6am she found the body of her husband lying at Nangoma.

11. PW6 Mary Nekesa, the 2nd deceased's 2nd wife, testified that around midnight she heard the voice of her co-wife calling the 2nd deceased. The doors and windows were banged and intruders got into the house and started assaulting the 2nd deceased using pangas and clubs. The intruders also assaulted her using whips, and forced the deceased out and allowed her to remain as she had a small baby. The witness was able to recognize some of the intruders from the light from the torches they carried. The witness recognized the appellants also with aid of moonlight. She later learnt that her husband had been killed and confirmed seeing his badly mutilated body.

12. PW7 Cpl Peter Maina and PW9 P.C Charles Kitea who were attached to Busia Police Station were informed that two people had been killed in Nangoma village. PW7 visited the scene and collected the bodies, whilst PW9 recorded witnesses' statements. The witness also visited PW1 whom he had been informed was with the deceased persons during the assault, and found he was in critical condition.

13. Dr. Patson Obuti, PW8 produced the post mortem reports on behalf of Dr. Kisilu, and confirmed that both deceased had multiple severe injuries, and the cause of each death was determined as cardiac arrest following trauma by sharp objects causing severe hemorrhage for both deceased persons.

14. The 1st appellant in his defence opted to give a sworn statement and denied the charges claiming them malicious. He stated that he was arrested 6(six) months after the incident; and that his names are Ernest Ojiambo Mulefu, and the name Museveni was unknown to him. He maintained that there was no information from the crowd as to who killed the deceased, and that it was impossible for PW6 to identify the members of the group of 20 people who invaded their home.

15. The 2nd appellant also gave a sworn statement denying the charges; and stating that while he knew the deceased persons, he did not know their homes.

16. The trial court having considered both the prosecution and appellant's case was satisfied that the evidence of the eye witness was strong and consistent, as the accounts of PW1, PW3 and PW4 aligned, that the evidence of PW5 and PW6 was consistent and corroborative, and that in addition the evidence supported the account given by PW1 as to how a crowd of people forced the 2nd deceased out of the house; that PW1, PW4, PW5 and PW6 saw and recognized the appellants by face and by voice, and

the appellants were well known to the witnesses as they were related to the witnesses; and resided one and half kilometers from the homes of the witnesses; that the voices of the appellants were well known to the witnesses as they spoke frequently; and the witnesses were aided by moonlight and torchlight to enable them recognize the appellants.

17. The court also noted that in as much as the appellants denied the charges, they did not lead any evidence that would place them away from the scene at the time of the commission of the crime, and that the sheer brutality of the assault on the deceased persons established malice aforethought; and that even if it was accepted that the deaths were caused by a mob, there was evidence that the appellants actively participated in the murder and could not hide behind numbers to avoid criminality.

18. From the evidence presented, the trial court found the appellants guilty as charged and convicted them accordingly. The appellants raised 4 grounds in the memorandum of appeal dated 31st May 2023, that: the prosecution evidence did not support the offence; that the evidence was merely circumstantial; their defence was improperly rejected; and the sentence was excessive, harsh, unconstitutional and unlawful.

19. In their written submissions, the appellants argue that the prosecution evidence did not prove the offence beyond reasonable doubt, acknowledging that whereas it is not disputed that the two persons lost their lives, no evidence was tendered linking the appellants as the persons who caused their deaths; that none of the prosecution witnesses was able to place either of the appellants at the scene of crime. Further, that the initial reports booked as OB No. 18/7/2/2010 and OB No. 4/7/2/2020 produced before the trial court are evidence enough that the complainants and/or eyewitnesses never mentioned the appellants herein as the: perpetrators of the offence; and that their names only came up later as an afterthought; and in any event, the names Museveni and Punda were never mentioned at the police station, and only came up during trial.

20. In addition, it is contended that since claims were made that the 2nd appellant took away mobile phones from PW4, the prosecution ought to have retrieved PW4's call log and tendered it in evidence if indeed the allegations were true, which essentially would place the 2nd appellant at the crime scene. It is submitted that the prosecution failed to prove actus reas and mens rea, which are vital elements for establishing the offence of murder. Reference is made to the decisions in Joseph Kimani Njau vs. Republic [2014] eKLR and Dickson Mwangi Munene & Another vs. Republic [2014] eKLR.

21. On this limb, the respondents submit that there was sufficient evidence tendered to prove a charge of murder against the appellant jointly; and that the ingredients of the offence were met. The respondent points out that the fact and the cause of death of the deceased persons were proved, and, a post-mortem conducted on the body presented by PW8 determined the cause of death for both deceased persons was the direct consequence of an unlawful act or omission on the part of the appellants acting jointly with others.

22. Drawing from the evidence of PW7 who mentioned that the deceased persons died as a result of mob justice, the appellants counsel maintains that the deceased persons were killed by unknown persons on the night of 6th February, 2010; and there was never proof of common intention amongst the appellants; that in any event, there was no proof that the appellants or their group acted on the threats they had made earlier that they would deal with cattle rustlers. Further, that PW4 claimed that there was bad blood between herself and the 2nd appellant, yet she did not elaborate how this would translate to why the 2nd appellant would want the 2nd deceased person dead or the involvement of the 1st appellant in their tussle.

23. In response, counsel on behalf of the state is categorical that the identity of the attackers was not in doubt, as they were identified by various witnesses with the aid of moonlight, voice recognition, and the appellants were neighbours and relatives of the prosecution witnesses.

24. In addition, that appellants participated in assaulting the deceased persons and were all armed with weapons namely panga, rungu, whips, which clearly demonstrated that the appellants had the intention to cause death or to do grievous harm to the deceased; that the appellants were well aware of their actions and intended the consequences of the said acts.

25. Our task on this limb is simply to determine whether there was sufficient evidence to warrant the trial court concluding that the appellants had murdered the two persons, or whether, the deceased were victims of mob justice, and their executioners remained unknown. The evidence before the trial court shed light regarding the genesis of what turned out to be a man-haunt and execution of the deceased persons-namely claims by one Clement that they were cattle thieves and it was time to teach them a lesson.

26. The learned judge took into consideration the chain of events, bearing in mind that indeed this was a mob, yet it was not an amorphous mob comprising unknown persons caught up in some wild frenzy. Nay it was a mob consisting of persons who were known to the witnesses as their fellow villagers, being their neighbours and relatives, and had known them over a long period, The opportunity for identification was not a rushed one off glance, but time spent in stamping their terror, and talking as observed by the trial court, the appellants and the witnesses had, had previous interactions in the recent past, and their vices were easy to recognise as they were not strangers. Further, they were armed with all manner of crude weapons, which they used mercilessly on the two victims; and the trial court in determining whether or not malice aforethought had been established stated:

> " From medical evidence, the 1st deceased was virtually beheaded while the attack on the 2nd deceased left him with a cut wound on the anterior abdomen and a cut wound on the throat that exposed the trachea and other major vessels. Those who caused these injuries could only have had one intention, that of killing the victims."

27. Indeed, the vicious manner in which the attack was executed resonates with a similar scenario observed in the case of Ali Salim Bahati & Another vs. Republic [2019] eKLR where this Court stated:

> " ... their vicious attack on the deceased was also a clear indication that they intended the consequences of their actions, that is, the death of the deceased.....
>
> Equally, it established malice aforethought on the part of the appellants."

We do not find any error in fact, law or principle, for the finding that the trial court made in this regard.

28. There is also the issue relating to the phone calls made during the incident, and the failure to present the call log, which omission, according to the appellants was fatal. The record clearly shows that the learned trial judge considered this issue, acknowledging the omission that there was failure to provide data from the mobile providers, but holding that it was not fatal. We share the same view for the singular reason that this was not the only evidence the prosecution relied on to place the appellants at the scene.

29. The appellants also lamented that their defences were not considered. As a matter of fact, the trial court considered their defences at paragraph 18-20, 24 of the judgment and at paragraph 57, the learned Judge pointed out that:

> " That said, these evidence must be considered in the light of the defence raised by the accused persons. A line of defence was that the deceased persons may have been killed by a mob whose members are unknown. It is the evidence of PW7 that the deaths of the deceased persons were because of mob justice. This evidence was inconformity with his recorded statement (D Exhibit 3). The defence further sought to discredit the prosecution case by questioning the unexplained delay in having the accused persons arrested and charged. It is argued that this confirmed that the persons responsible for the death of the deceased persons were unknown.
>
> 59. No doubt, the accused persons were not arrested and charged promptly. No doubt the accused persons acted in a mob. But what is to be said of the strong, credible and consistent evidence that the accused persons were members of the mob that ejected the two deceased persons from their houses and inflicted deadly blows on them that resulted in their deaths. Evidence that would not be weakened even if the evidence of PW6 and PW7 were to be excluded. Evidence that would still remain strong even if the mobile data of the telephones of PWI and the 2nd deceased were not subjected to analysis."

Need we say more? The defence was considered and weighed against the evidence presented by the prosecution; aptly rejected in the face of the strong and consistent evidence by the prosecution witnesses.

30. With regard to the sentence which is described as harsh, excessive and unconstitutional, it is submitted that the mandatory death sentence is not only inimical to international law and customs, but it is also unconstitutional for it violates article the appellants' right to be free from cruel, inhuman and degrading treatment under Articles 29(f) and 25(a), right to inherent dignity under Article 28 and the right to life as enshrined in article 25(c). We are thus urged to set aside the sentence and adopt the approach recommended by the Supreme Court in subsequent guidelines in the case of Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR.

31. In opposing this limb of the appeal on sentence, the respondent submits that the death penalty remains a lawful sentence which is still applicable as a discretionary maximum punishment, and reference is made to the Supreme Court's directions in *Muruatetu & Another vs. Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015*) [2021] KESC 31 (KLR) (6 July 2021) (Directions). It is contended that the trial court had the opportunity to read the pre-sentence report and the previous record of the appellant produced in court and applying its discretion was convinced that the death penalty was the most appropriate under the circumstances. We are thus urged to uphold both conviction and sentence, and make a finding that the appeal lacks merit and the same should be dismissed.

32. 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.

33. The trial court gave direction that on 8th December 2016 the appellants would attend sentencing. It will be noted that the appellants were represented by Mr. Ipapu. On said date Mr. Obiri for the State informed the trial court that the appellants were serving 10 years imprisonment in Busia Chief Magistrate Criminal Case No. 914 of 2010 for attempted murder. Mr. Ipapu for the appellants

informed the court that he had looked at the pre-sentence report and had no comments on the same as the previous records spoke for themselves. The trial court upon looking at the pre-sentence reports and the mitigation of the appellants went on to sentence the appellants to death on count 1(one) leaving the sentence on count two in abeyance.

34. In Francis Muruatetu & Another vs. Republic, [2017] eKLR the Supreme Court of Kenya 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.

35. In the same case the Court in regard to the application of mitigation by the accused before sentencing, it 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 that censure or in the converse impose the death penalty."

36. From the circumstances of this case, the two deceased persons died very cruel and brutal deaths as evidenced by the injuries in post mortem report. Two lives were lost in the most cruel and brutal fashion. The appellants at the time of the sentencing were serving 10 years for attempted murder going clearly to show the character of the appellants. It is this Court's view that the learned judge properly exercised his discretion in sentencing. We see no reason to disturb the sentence of death meted out on the appellants. The same is hereby affirmed and upheld.

    The upshot of the foregoing is that the appellants appeal sentence is without merit. The same is hereby dismissed.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 8TH 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**