Chacha v Republic (Criminal Appeal 253 of 2019)
[2024] KECA 1812 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1812 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 253 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

DECEMBER 20, 2024

BETWEEN

NYAGWISI CHACHA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Kisii, (Sitati, J), delivered by (Nagillah, J.) on 9th December, 2014 in HCCRC NO. 54 of 2010)

JUDGMENT

1. Nyangwisi Chacha, the appellant before us, was arraigned before the High Court, 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, were that, on 27th November, 2009, at Kiandege Village in Kuria District within Nyanza Province, jointly with another not before the Court, they murdered Isaiah Marwa Chacha (deceased).

2. The appellant pleaded not guilty to the charge and a trial, in which the prosecution called six witnesses, ensued. Of note is the evidence of Moses Chacha (Moses), a brother to the deceased, Selina Robi Marwa (Selina), wife to the deceased, and Dr. Ruwa Sammy Mwatela (Dr. Ruwa) who produced the postmortem report.

3. Moses testified that he was in his shamba when he heard screams, when he ran to where the scrams were coming from, he saw the appellant armed with a raised panga, but on seeing Moses, the appellant ran into the bush. Moses then went to the spot where the appellant was, and found the deceased lying on the ground, with cuts on the neck and over the body. Selina Robi Marwa (Selina), wife to the deceased, stated that she saw her husband talking to the appellant, who was grazing cows. She heard her husband ask the appellant not to graze cattle at that place. Shortly thereafter, Selina heard her husband crying for help, and on rushing to where her husband was, she found him lying down with cuts on the

neck and all over the face. Selina claimed she saw the appellant and his brother one Morega Nyabusi, cutting the deceased while he was on the ground. Dr. Ruwa Sammy Mwatela (Dr. Ruwa) produced the postmortem report on behalf of Dr. Okunga who had done the post mortem examination, but who could not be called to testify as he had gone for further studies in South Africa. According to the report, the deceased had deep cut wounds on several parts of the body, and the cause of death was cardiopulmonary arrest, due to excessive bleeding.

4. The appellant, in his unsworn statement, made in his defence, explained how he was arrested when he went to the Assistant Chief to get an ID card. He explained that he knew nothing about the allegations of murder, and maintained that the evidence of Moses was a lie, because Moses had a personal vendetta against him, which arose from a bicycle Moses had left with the appellant in return for a loan of Kshs. 3,000/-, which bicycle the appellant later pledged for a loan, after Moses failed to repay him his Kshs.3000. He maintained that Moses and Selina conspired to fix him because of this personal vendetta.

5. In her judgment, the learned Judge (Sitati, J.) having examined the evidence of Moses, Selina and Dr. Ruwa, amongst others, found that the evidence was clear that it was the appellant who assaulted the deceased, and caused him injuries which led to his death. She further held that the action of the appellant, of cutting the deceased severally on the neck, head and face, with a panga, was intended to either kill or cause grievous harm to the deceased, and therefore malice aforethought could be inferred under Section 206(b) of the Penal Code. She therefore found the prosecution case proved to the required standard. Consequently, the learned Judge found the appellant guilty of murder, convicted him and sentenced him to death.

6. The appellant, being dissatisfied, is now before us in a first appeal, in which he has raised six grounds. He faults the learned Judge for erring in law and fact, in finding that the 'panga' was the murder weapon when there was no expert evidence regarding the blood stains, nor any DNA report, or forensic report on the fingerprints if any found on the weapon; in failing to consider and evaluate the contradictions in the evidence of the prosecution witnesses; in failing to observe that the witness who was alleged to have screamed "usimuuwe, usimuuwe" was never called to testify; in failing to observe that the prosecution failed to bring the doctor who conducted the postmortem examination, as an expert witness to prove the cause of death; in convicting the appellant on evidence that was insufficient to prove the case beyond reasonable doubt; and in imposing on the appellant the death sentence which was in the circumstances harsh, excessive and callous.

7. The appellant filed written submissions through learned counsel, Otete Job Mokaya, in which counsel submitted that the prosecution failed to prove the facts as outlined in their opening statement; that the alleged murder weapon was not produced in evidence; that Moses's evidence was hearsay as he relied on a voice which was not identified; that Moses also relied on hearsay evidence regarding the appellant being armed with a panga, as he did not reveal where he got the information from; and that there was no proof of any land dispute existing between the deceased and the appellant.

8. Learned counsel Mr. Mokaya added that the prosecution did not discharge the burden of proof, as the elements of the offence of murder were not proved; that there was no evidence that the deceased died out of an unlawful act caused by the appellant; that there was contradiction in the prosecution case, regarding the date the offence occurred, and the date the appellant was arrested; and that there was no proof of mens rea or malice aforethought.

9. On sentence, counsel for the appellant submitted, that the High Court did not take into account the fact that appellant was a first offender, and argued that had this fact been taken this fact into account, the death sentence would not have been imposed. Counsel cited the Supreme Court decision in Francis

Karioko Muruatetu & another -vs- Republic [2017] eKLR, arguing that the death penalty is no longer mandatory, as the Supreme Court outlawed the mandatory death penalty as unconstitutional. It was argued that the appellant having already spent close to fifteen years in prison, was a reformed person, and the Court should therefore, reduce his sentence.

10. The prosecution opposed the appeal through written submissions that were duly filed by Ms. Kitoto Victorine, a Principal Prosecution Counsel in the Office of Director of Public Prosecution (ODPP). The respondent identified the ingredients of the offence of murder that were required to be proved in order to secure a conviction, first, as proof of the death and the cause of death of the deceased; and second, as proof of the actus reus and mens rea, that is, that the death of the deceased was a direct consequence of an unlawful act or omission on the part of the appellant, and proof that the said unlawful act or omission was committed with malice aforethought. the respondent submitted that the evidence of Dr Ruwa confirmed the death of the deceased and the cause of death; and that the injuries noted by Dr. Ruwa were inflicted deliberately, and were strategic and intentional.

11. Regarding the identity of the person who inflicted the fatal injuries on the deceased, the respondent pointed out that the evidence of Moses, and that of Selina, identified the appellant and his brother Morega, as the persons who assaulted the deceased.

    Republic -vs- Stephen Kiprotich Leting & 3 others [2009] eKLR, was cited for the argument that there was express malice proved from the injuries that were inflicted on the deceased, which injuries proved an intention to cause death or grievous harm, and therefore malice aforethought as defined under section 206 of the Penal Code was established.

12. In regard to sentence, the respondent pointed out that section 204 of the Penal Code provides for the death sentence, and although the Supreme Court declared the mandatory nature of the death sentence unconstitutional, the death sentence can still be imposed in deserving circumstances. The respondent argued that the circumstances in the appellant's case, where multiple blows were inflicted on the deceased's head and neck, with a sharp panga, leading to the deceased's death, deserved the death penalty.

13. This being a first appeal, this Court is mindful of its duty as a first appellate Court. This duty was well articulated in Erick Otieno Arum v 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 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 demeanor and so the first appellate court would give allowance for the same"

14. In accordance with our duty as above stated, we have carefully considered the appeal, the contending oral and written submissions made by both counsel, together with the authorities referred to, and the law. The main issues that we discern for our determination are, first, whether the evidence that was adduced in the trial court was sufficient to prove the charge of murder against the appellant, and if so, whether this Court should interfere with the sentence that was meted out against the appellant.

15. The appellant was charged with murder under Section 203 of the Penal Code. The section provides that:

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

16. To sustain a charge under the said provision, the prosecution has to prove three things. First, the death of the deceased, and cause of death; second, that the death of the deceased was a result of an unlawful act or omission on the part of the accused person; and third, that the unlawful act or omission was committed with malice aforethought. (See also Roba Galma Wario -vs- Republic [2015] eKLR).

17. It is common ground that the deceased died, as this fact is not substantially in dispute, several prosecution witnesses having testified that the deceased died at the scene. This evidence was corroborated by the postmortem report, and the evidence of Dr Ruwa, which showed that indeed the deceased died as a result of "cardiopulmonary arrest secondary to excessive bleeding".

18. The germane questions that were in dispute were, whether the death of the deceased occurred as a result of the unlawful act or omission of the appellant and if so, whether the appellant had malice aforethought. In this regard, the crucial evidence was that of Selina and Moses. Selina stated that she rushed to the scene after hearing the deceased scream for help, and she saw the deceased lying on the ground with panga cuts on the neck and over his face. She swore that she saw the appellant and his brother, cutting the deceased while the deceased was on the ground. This prompted Selina to raise an alarm to which Moses responded. Moses saw the appellant with a panga raised, and when the appellant saw Moses, he ran into the nearby bush. When Moses went to the spot where the appellant had been, he found the deceased on the ground with panga cuts all over his body.

19. Selina explained that although she was a short distance away, she had earlier seen the appellant grazing cattle and heard the deceased talking to the appellant. Salina stated that the appellant is her cousin, while Moses testified that he had known the appellant for about 8 years. These facts were not disputed by the appellant. Therefore, it is evident that the appellant was well known to the two witnesses, and he was identified by recognition as the witnesses were able to see him clearly. As was stated by Madan JA, in Anjonini & others -vs- Republic [1980] KLR:

> " .... This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

20. Similarly, in Peter Muzao Mwanzia -vs- Republic [2008] eKLR, this Court expressed itself as follows:

> " We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend, or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question."

21. In his defence, the appellant claimed that Moses had a vendetta against him, because of a bicycle, and that Moses and Salina who were in laws, had planned together to fix him. However, his allegation does not explain the fact that the deceased was actually attacked and killed. Nor does it explain the fact that

there was actually a land dispute between him and the deceased. These are facts that could not have been manufactured by Moses and Selina. We find that the appellant's defence was nothing more than a cock and bull story, that was rightly rejected.

22. The evidence of Moses and Selina, proved that the appellant and his brother were at the scene, and assaulted the deceased and caused him the injuries that resulted in the deceased's death. Given the bad blood that existed between the appellant and the deceased, and the vicious nature of the injuries that were inflicted on the deceased using a panga which was in the circumstances a deadly weapon, it is evident that the appellant and his brother intended to cause either a grievous harm or death to the deceased and therefore malice aforethought was properly inferred under Section 206(a) and (b) of the Penal Code.

23. The appellant drew the Court's attention to discrepancies in the evidence of the prosecution witnesses. In this regard, what this Court stated in Joseph Maina Mwangi -vs- Republic [2000] eKLR, is instructive.

> "In any trial, there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 CPC, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

24. The discrepancies concerned the dates the offence was committed, the date the body of the deceased was removed from the scene, and the date the appellant was arrested. While the witnesses were confused about the dates, their inconsistencies did not substantially affect their evidence. Nor did it affect the substratum of the main issue before the Court. We are satisfied that the inconsistencies did not prejudice the appellant and are curable under Section 382 of the Criminal Procedure Code.

25. As regards the failure to produce the murder weapon during the trial, this Court has held severally that such failure is not fatal to the prosecution case. In Gerishon Kubai Mwithia v Republic [2013] KECA 220 (KLR), where there was an issue regarding the failure to produce the murder weapon, the Court stated:

> "We adopt and cite the case of *Ramadhan Kombe - vs- Republic, Criminal Appeal No. 168 of 2002* at Mombasa where this court faced with a similar submission stated:
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> In the matter before the trial court and before us, the cause of death of the deceased is patently obvious. The weapon used was a sword. There is no other version of how the deceased was killed nor by whom. Moreover, the record shows that the doctor who prepared the post mortem report was cross-examined. The failure by the prosecution witness to produce the murder weapon was not fatal to the case of the prosecution nor did it prejudice the appellant's defence. We have no hesitation in rejecting this submission.
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> 17. We draw comfort from the prosecution evidence that the murder weapon was in the hands of the appellant. Both PW1 and PW2 saw the appellant with the sword; the weapon was recovered from the house where the appellant lived; the post mortem report showed that the deceased died of stab wounds inflicted on the right side as testified by PW1. We find the case of Ekai –v –R, Criminal Appeal No. 115 of 1981 relevant to the present case where it was held "that though the murder weapon had not been produced, the conviction stood on the basis of the post mortem examination which established beyond all reasonable doubt that the fatal injury had been caused by a sharp bladed

> weapon…" It is our finding that in the present case, failure to produce the murder weapon was not fatal to the prosecution case."

26. Such was also the case in Chris Kasamba Karani -vs- Republic [2010] KECA 478 (KLR), where a panga which was used in a charge of robbery with violence was irregularly produced. This Court stated:

> "…in our view, nothing turns on the irregularity because the production of that exhibit did not affect any ingredient of the offence. The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit."

27. Consequently, we find that even though the panga was not produced in evidence, the postmortem examination established beyond reasonable doubt that the fatal injury was caused by a sharp weapon. In addition, Moses and Selina saw the appellant holding a panga, while the deceased was on the ground with cuts on his neck and face, removing any doubt that the panga was the murder weapon.

28. As regards the failure to call the witness who allegedly screamed 'usimuuwe', Moses did not testify as to who the person was. However, from the evidence it is apparent that the person was Selina, who raised the alarm when she saw her husband had been attacked and injured. Nothing therefore turns on this ground.

29. Coming to the sentence, the appellant's complaint was that the sentence was harsh and excessive. It is clear that sentencing is the discretion of the trial court. This was stated clearly by this Court in Bernard Kimani Gacheru -vs- Republic [2002] KECA 94 (KLR), where the Court made it clear that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

30. We notice that although the case was heard and judgment prepared by Sitati, J., the sentence was delivered by a different Judge, Nagila, J. The sentence was delivered on 19th December, 2014, which was before the Supreme Court's decision in Francis Karioko Muruatetu -vs- Republic [2017] eKLR. Therefore, the learned Judge in imposing the sentence, was constrained by the mandatory sentence provided under section 204 of the Penal Code. Although the Supreme Court has since declared the mandatory nature of that sentence to be unconstitutional, the respondent has argued that given the circumstances in which the appellant committed the offence, the death sentence was deserved.

31. In light of the fact that the learned Judge (Nagila, J.) did not have the benefit of the Supreme Court Muruatetu decision, we find that the learned Judge did not properly consider all the options that were available to him in sentencing the appellant. In addition, the learned Judge not having conducted the trial, did not appreciate the circumstances nor did he consider the appellant's mitigation. For these reasons we find that there is justification for us to interfere with the sentence that was imposed by the learned Judge.

32. Considering the circumstances of the case, the injuries that were inflicted on the deceased, and the appellant's mitigation, we consider a sentence of forty (40) years imprisonment to be appropriate. We therefore set aside the death sentence that was imposed on the appellant, and substitute thereto a sentence of forty (40) years imprisonment. The sentence shall be computed from 2nd July, 2010, which is the date that the appellant was first arraigned in court, as the appellant remained in custody throughout his trial.

Those shall be the orders of the Court.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 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 is a true copy of the original

DEPUTY REGISTRAR