Ekitela v Republic (Criminal Appeal 189 of 2018)
[2023] KECA 155 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KECA 155 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 189 OF 2018

F SICHALE, FA OCHIENG & LA ACHODE, JJA

FEBRUARY 17, 2023

BETWEEN

JOHN EKAI EKITELA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kapenguria (S.M Githinji, J) dated 20th June 2018 In HCRA No. 17 of 2016)

JUDGMENT

1. John Ekai Ekitela (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 the 26th day of March 2011, at around 8:00PM, at Kaibos Location within West Pokot County, he murdered Eunice Chepkemei.

2. The appellant was tried and convicted of the offence and sentenced to serve life imprisonment. Being aggrieved with both the conviction and sentence, the appellant has now filed this appeal and probably the last appeal, *vide* his homemade grounds of appeal filed in Court on 5th July 2018. In a nutshell, the appellant is raising the following grounds of appeal; that the trial judge erred in law and facts by convicting him without considering the evidence of the doctor who produced the post mortem report, that the trial judge erred in law and fact by convicting the appellant by relying on grave contradictions of the witnesses and that the trial judge erred in law and fact by dismissing his defence without any cogent reason hence shifting the burden of proof to the appellant.

3. The appeal was urged by way of written submissions with oral highlights by the parties on 8th December 2022. When the parties appeared before us for plenary hearing, Mr. J.K Korir, learned counsel for the appellant appeared to have abandoned the earlier grounds filed by the appellant and submitted that mens rea was not established and that the appellant ought to have been convicted for the offence of

manslaughter. Consequently, we were urged to set aside the conviction of murder and substitute the same with manslaughter and grant the appellant a lenient sentence taking into account the period he had stayed in custody.

4. Mr. Meshack Rop on the other had for the respondent while opposing the appeal relied on his written submissions and urged that the ingredients for the offence of murder were proved and that the tool used to kill the deceased was a wooden jembe handle. Further, that the post mortem report showed that the deceased was beaten and that there were witnesses who witnessed the beating. He further submitted that the appellant disappeared after the incident and this shows that indeed there was malice aforethought.

5. 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 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 demeanour and so the first appellate court would give allowance for the same"

6. A brief analysis of the evidence in the trial court is necessary so as to reach our own independent conclusion on the guilt or otherwise of the appellant. The evidence before the trial court was as follows:

> PW1 was Michael Kiptoo and a son to the deceased. It was his evidence that on 26th March 2011, he was at home with his brothers when his stepfather (the appellant) came home at around 7:00PM while drunk.

7. He then asked them where the deceased was and they told him that she had gone to the toilet. The appellant then locked the door from inside locking the deceased outside and the deceased started pleading with him to open the door. He obliged and went outside and started beating the deceased with a club. The appellant then opened the door and brought the deceased inside the house. PW1 went to call his grandmother and when he returned, he still found the appellant beating the deceased. The appellant then poured water on the deceased and changed her clothes and they later slept but the following morning the appellant was found missing, having fled from the scene.

8. PW2 was Veronicah Chebet. She testified that on 26th March 2011, PW1 had come to her house and told her that his stepfather (the appellant) was beating the deceased with a jembe and he was wondering whether she would survive. The following morning, she went to the scene and found the deceased already dead and the appellant missing.

9. PW3 was Eliud Rotich. It was his evidence that on 26th March 2011, he was at home with his brothers when the appellant came and asked them where the deceased was and they told him that she was outside. The appellant then locked the deceased outside and when the deceased knocked, the appellant opened and got outside armed with a stick and started beating her until the stick broke into pieces. The appellant then got back into the house, took a jembe handle and continued attacking the deceased until she went silent. The appellant then poured cold water on the deceased and changed her clothes and later escaped.

10. PW4 was Margaret Tulia. It was her evidence that the deceased was her niece. On 30th March 2011, she was called from Kaibos and informed that the deceased had passed on. She proceeded to Kapenguria hospital mortuary and witnessed the post mortem.

11. PW5 was Dr. Jotham Mukhola who produced a post mortem report in respect of the deceased; the said report was prepared by Dr. Ochuka. According to the report, the body of the deceased had bruises on the face, blood from ears, nose, bruises on arms and the thigh. The left face which was swollen had bruises and there was bleeding on the left side of the skull. The cause of death was cardio pulmonary arrest due to assault with intracranial bleeding.

12. PW6 was PC Mohammed Abdi attached to CID Kapenguria and the investigations officer in the case. He narrated the events leading to the arrest of the appellant who had initially escaped after the commission of the offence until the time of his arrest on 12th November 2014. He later charged him with the offence of murder.

13. Put to his defence, the appellant gave a lengthy sworn statement and called no witness. He denied having committed the offence.

14. From the appellant's submissions, only one issue falls for our determination, namely:

1.Whether mens rea/malice aforethought was established beyond reasonable doubt to warrant a conviction of murder?

15. Section 206 of the *Penal Code* defines malice aforethought in the following terms:

> " 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." (emphasis added).

16. In the instant case both PW1 and PW3 witnessed the appellant assaulting/beating the deceased with a club/ wooden jembe handle and that initially the appellant had locked the deceased outside the house. PW1 testified that he went to call his grandmother to come and witness the assault. Upon his return, he found the appellant still attacking the deceased. PW3 on the other hand testified that the appellant beat the deceased with a stick until it broke into pieces. He further testified that later on, the appellant went into the house, took a jemble handle and continued attacking the deceased until she went silent. He then poured water on her.

17. According to a postmortem report produced by PW5, the deceased's body had bruises on the face, blood from ears, nose, bruises on arms and on the thigh, the head was bruised on the left side of the skull and the cause of death was indicated to be intracranial bleeding.

18. In the case of *Daniel Muthee v Republic* Criminal Appeal No. 218 of 2005 (UR) this Court while considering what constitutes malice aforethought stated as follows:

> " When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the *Penal Code*."

19. From the evidence on record we are satisfied beyond any reasonable that the amount of force used in viciously attacking the deceased was only meant to serve one purpose; to kill the deceased. Initially, the appellant locked the deceased outside and proceeded to viciously attack her without any slightest provocation with a club/jembe. More tellingly so, when PW1 left the house to go and tell his grandmother about what was happening, he returned and found the appellant still assaulting the deceased. PW3 further testified that the deceased was attacked until the stick broke into pieces whereupon the appellant went into the house took a jembe handle and continued attacking the deceased who was screaming. The attack persisted until the deceased went silent.

20. In the instant case, the appellant attacked a helpless woman with a jembe handle without any provocation until he killed her. The choice of weapon and the excessive force used on the deceased was solely intended to kill her. The extensive injuries on the body of the deceased as evidenced by the post mortem report confirms as much. The appellant must have known or ought to have known that his actions would either kill the deceased or occasion her grievous harm. The contention by the appellant that the deceased provoked her by knocking at the door is clearly without basis as that cannot amount to provocation and no evidence was tendered whatsoever to prove that indeed the deceased provoked the appellant. Additionally, the appellant disappeared after committing this heinous crime only to be arrested two and a half years later and all these actions/conduct lead to an inevitable conclusion of a person who knew what he was doing.

21. From the circumstances of this case and for the reasons aforestated, it is our considered opinion that the appellant's conviction for the offence of murder was safe and sound and well founded and we have no basis to interfere with the same. We are satisfied that the appellant had the requisite mens rea at the time of the commission of the offence to warrant a conviction for the offence of murder. Consequently, the appellant's appeal on conviction must fail and the same is hereby dismissed in its entirety.

22. On sentencing, the appellant was sentenced to life imprisonment. The trial court while sentencing the appellant considered the circumstances under which the offence was committed. From the circumstances of this case, the deceased was viciously attacked without any provocation, and we hold the considered opinion that that constituted an aggravating factor. Accordingly, there is no basis to warrant a reduction of the sentence.

23. In the upshot, the appellant's appeal is without merit and the same is hereby dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF FEBRUARY, 2023.

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR