Sikuku v Republic (Criminal Appeal 114 of 2014)
[2023] KECA 149 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KECA 149 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 114 OF 2014

FA OCHIENG, LA ACHODE & WK KORIR, JJA

FEBRUARY 17, 2023

BETWEEN

PATRICK WANJALA SIKUKU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kitale (H.K.Chemitei, J.) delivered on 9th October, 2012inHC Criminal Case No. 43 of 2012)

JUDGMENT

1. Patrick Wanjala Sikuku, the appellant herein, was on 26th November, 2012 arraigned before the High Court on the charge 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 28th October, 2012, the appellant unlawfully murdered Michael Juma Wasike at Botwa farm in Kaplamai location within Trans-Nzoia County. He denied the information and a plea of not guilty was entered.

2. The case for the prosecution was anchored on the evidence of four witnesses. Gladys Nekesa gave her evidence as PW1 stating that on the material day, she was at her father's home for the memorial ceremony of her late brother. In the cause of the night as the people danced to the music that was being played, the appellant attempted to dance with her in front of her father which request she declined. The appellant then started screaming and the deceased was summoned to get him out of the house.

3. The appellant and the deceased then went outside and stayed for almost 30 minutes after which the appellant came back into the house. No sooner had the appellant entered the house than screams from the crowd outside the house filled the air claiming that the appellant had killed someone. The appellant then escaped through the window as he threw away a knife he was holding. PW1 stated that there was electricity that she used to recognize the appellant.

4. Johana Juma gave evidence as PW2 and stated that on the material day while he was inside the house, he heard people saying someone had been killed. The crowd outside said the person who had just entered the house had killed someone. The appellant had just entered the house followed by a mob. The appellant then jumped out of the window as he threw away, the knife he had. PW2 then went out and found the deceased lying down with blood oozing from his chest. The deceased was then rushed to Kaplamai hospital where he succumbed to the injury.

5. PW3 Dr Moses Okumu gave evidence on behalf of Dr Odhiambo. His evidence was that Dr Odhiambo had conducted a post-mortem on the deceased and concluded that the deceased died as a result of cardiopulmonary arrest secondary to internal and external hemorrhage. He backed his testimony by producing a post-mortem report as an exhibit.

6. PW4 Sergeant Jacob Magonge from Cherangany Police Station testified that on the material day, he received a call from the Chief of Kaplamai Location informing him that the deceased had been stabbed by the appellant after a quarrel ensued over PW1 in a memorial ceremony. PW4 produced a knife as an exhibit and testified that he recovered it from the scene where the deceased had fallen. It was his evidence that the appellant was arrested by members of the public the next morning. On cross-examination, he testified that the knife was handed over to him by PW2 who had collected it from the site where the deceased was stabbed. He also stated that there was no electricity at the home and that the window was small though someone could squeeze through it.

7. In his unsworn testimony the appellant attested that he had gone to the memorial ceremony at the deceased's request. While at the venue, there was food and alcohol which they took. He also stated that the people at the venue were also dancing to the music which was being played. While at the dance floor, PW1 poured beer on his feet and upon confronting her, she became arrogant. He was angered by the arrogance of PW1 and it took the elders to separate them even though PW1 stated that she was not done with him. A few minutes later, the deceased returned and he informed him of the incident. PW1 and the deceased then started quarreling and they were separated. Thereafter, the deceased escorted him towards the road and he proceeded to his father's place. While at his home, a crowd of which PW1 was a member went and arrested him. That is when he learned that he was being accused of killing the deceased.

8. After hearing the case from both the prosecution and defence, the learned Judge of the High Court on 21st September, 2017 found the appellant guilty of the offence as charged. The appellant was on 9th October, 2017 sentenced to suffer death.

9. The appellant being dissatisfied with the judgment of the trial court, through the memorandum of appeal dated 18th October, 2017, challenges the decision on the grounds that the trial judge erred by relying on the hearsay evidence of the prosecution witnesses; that the trial court did not take into consideration his defence; and, that crucial witnesses were not called by the trial judge to prove the case for the prosecution beyond reasonable doubt thereby leading to the shift in the burden of proof to the appellant. In supplementary grounds of appeal, the appellant asserts that Section 204 of the *Penal Code* is inconsistent with the *Constitution* and invalid as it provides for mandatory death sentence.

10. When this appeal came up for hearing before us on 19th October, 2022, Mr. Oduor for the appellant informed us that they had abandoned the appeal against conviction. He therefore sought to solely rely on his submissions dated 4th February, 2022 which were limited to challenging the death sentence imposed on the appellant. Counsel invoked the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR to submit that the death sentence passed by the trial court was

unconstitutional. He invited this Court to adopt the decision in the cited case and remit this case back to the trial court for the re-sentencing of the appellant.

11. In his oral presentation, counsel for the appellant relied on the case of *Wycliffe Wangusi Mafura v Republic* [2018] eKLR to submit that although this Court can review the sentence of an appellant, in the circumstances of this case the resentencing should be done by the trial court as it failed to take into account the mitigating circumstances as well as the various provisions of the Sentencing Policy Guidelines, 2016. Counsel also pointed out that the respondent had conceded the appeal on sentence on the ground that the case did not warrant a death penalty. In conclusion, counsel urged us to remit this case to the trial court for re-sentencing of the appellant.

12. Mr. Fedha represented the Director of Public Prosecutions who appeared for the respondent. Through the written submissions, the respondent urged that the conviction was safe and supported by the evidence on record. On sentence, the respondent conceded that in as much as the death sentence passed was legal, the circumstances of the case did not warrant the death penalty. The respondent requested that the sentence be substituted with a definite prison sentence.

13. Submitting orally at the hearing, Mr. Fedha urged us to invoke this Court's power to review sentence on appeal and subsequently proceed to sentence the appellant to 30 years imprisonment *in lieu* of the death penalty. It was counsel's view that the proposed custodial period was in the backdrop of the fact that the deceased was a young man whose life was ended by the appellant. He also asserted that the appellant had not shown any remorse.

14. Although the appellant through his counsel verbally abandoned his appeal against conviction during the on-line hearing, we will conduct a brief analysis of the testimony adduced at the trial in order to satisfy ourselves that the conviction is safe. Section 203 of the *Penal Code* creates the offence of murder as follows:

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

15. Section 206 of the same *Code* proceeds to define malice aforethought as follows:

> " 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."

16. It then follows that for us to uphold the conviction for the offence of murder, the evidence adduced by the prosecution must prove that the death of the deceased was caused by the appellant; and that the appellant had the requisite malice aforethought. The question then is whether the evidence of the

prosecution witnesses proved that the appellant caused the death of the deceased and that he was of malice aforethought when he did so.

17. The death of the deceased is not in contention. The death was confirmed by the evidence of PW3 that the deceased died of cardiorespiratory arrest secondary to internal and external hemorrhage. The deceased also had a stab wound on the left side of his chest.

18. As to the person who inflicted the fatal injuries on the deceased, PW1 testified that she had an altercation with the appellant after which the deceased was called upon to take the appellant out of the house. The appellant then went outside with the deceased and after about 30 minutes, he emerged in the midst of shouts from a crowd in hot pursuit that he had killed someone. She testified that the appellant had a knife which he threw away at the point of jumping outside through the window. This account of events is similar to that of PW2 save for the fact that PW2 did not see the appellant leave the house with the deceased.

19. In his defence, the appellant conceded to having been at the scene where the offence took place. He also conceded having had an altercation with PW1. He, however, denied having any differences with the deceased whom he claimed escorted him out of the compound when he was leaving the party.

20. There was no eyewitness to the actual commission of the offence, however, PW1 and PW2 as well as the appellant's own evidence places the appellant at the scene. Nevertheless, the big question is whether the appellant was responsible for the death of the deceased. Put differently, the question is whether the evidence of the prosecution proved beyond reasonable doubt that it was the appellant and nobody else who caused the death of the deceased. As we have already stated, the evidence on record is clear that none of the witnesses actually saw the appellant commit the act that led to the deceased's death. In the absence of such direct evidence, the prosecution's case is one based on circumstantial evidence.

21. The factors to be considered as to whether circumstantial evidence should be used to return a conviction were espoused by this Court in *Chiragu & another v Republic* [2021] KECA 342 (KLR) which cited with approval *Abanga alias Onyango v Republic* CR. App NO. 32 of 1990 (UR) thus:

> "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

22. In this case, it is the evidence of PW1 and PW2 that links the appellant to the killing of the deceased. Most crucial is the evidence of PW1 that the appellant was taken out of the house by the deceased. The evidence of PW2 on the other hand is that he came into contact with the appellant after the act. PW2 states that he was informed by the musicians that the person who had entered the house had killed someone. He also testified that he saw the appellant jump out of the window as he threw the knife away. PW1 also talked of the appellant throwing away a knife.

23. It is our view that the evidence on record places certain serious accusations against the appellant. Both the evidence of the appellant and that of PW1 leads us to one conclusion, that it is the appellant who was the last person in the company of the deceased before the deceased was found dead. We are also convinced that the evidence of PW1 and PW2 is corroborative to the extent that it offers an account

of what transpired after the deceased was stabbed. Our opinion finds support in this Court's decision in *Moingo & another v Republic* [2022] KECA 6 (KLR) where it was stated at paragraph 22 that:

> " The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to give a reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the Last Seen doctrine in the prosecution of murder or culpable homicide cases is that, where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased (see the Nigerian case of Moses Jua v the State [2007] PELR-CA/11 42/2006)."

24. Applying the *dictum* above to the present case, the evidence on record clearly shows that the deceased was last in the company of the appellant after which he was found dead. The question then is whether there is another set of evidence, either by the appellant or the prosecution, that exonerates the appellant from the acts that led to the death of the deceased or that which explains how the deceased met his death. In this case, the appellant did not offer an explanation to exonerate himself from the murder. His averment that he walked home after the deceased escorted him from the party is dislodged by the evidence of PW1 and PW2 who testified that the appellant ran back into the house carrying a knife and escaped through a window. The appellant did not attempt to explain why he was carrying the knife. There can be no other explanation apart from the conclusion that the knife was the murder weapon.

25. In the circumstances of this case, we associate ourselves with the statement of this Court in *Mungai v Republic* [2021] KECA 51 (KLR) that:

> " Once a person so situated fails to offer a plausible explanation for such accusative evidence linking him to the commission of the crime, section 119 of the *Evidence Act* permits the court to presume the existence of any fact which is likely to have happened, regarding being had to the common course of natural events and human conduct."

26. We are therefore convinced in the circumstances and based on the evidence on record that the inculpatory facts lead to one conclusion, that it was the appellant who stabbed the deceased. We do not envision any co-existing facts or circumstances that weaken the inference we have made. We are therefore convinced and satisfied that the appellant's conviction is safe and sound.

27. As already stated, the only issue raised by the appellant in this appeal relates to the unconstitutionality of the death sentence. The issue raised by the appellant was settled by the Supreme Court in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR when it determined that although the death sentence in murder cases was not unconstitutional, the same was not mandatory and courts could impose a lesser sentence depending on the mitigation of an accused. The proper question we pose therefore is whether we should interfere with the death sentence imposed on the appellant.

28. There is a minor issue that we need to mention. The appellant's counsel insisted that we ought to remit this matter to the High Court for the resentencing of the appellant. The respondent's counsel was of the different view, that this Court has jurisdiction to impose the proper sentence on the appellant. Our position is that we have an appeal before us challenging the sentence imposed on the appellant. Rule 33 of the *Court of Appeal Rules*, 2022 grants this Court general powers as follows:

> " On any appeal from a decision of a superior court, the Court shall have power, so far as its jurisdiction permits—

(a) to confirm, reverse or vary the decision of the superior court;

(b) to remit the proceedings to the superior court with such directions as may be appropriate; or

(c) to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs."

29. The powers granted to this Court are exercised as is appropriate.

The appellant's mitigation before the trial court is on record and we find no reason as to why we should burden the trial court with a matter it has already dealt with while we are in a position to conduct a review of the sentence ourselves. The issue of the appropriateness of the sentence imposed on the appellant is properly before us and we will tackle it as requested by the appellant through his supplementary grounds of appeal.

30. In *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR, this Court stated with regard to the sentencing jurisdiction of an appellate court as follows:

> "...as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive."

31. The Supreme Court judgment in Muruatetu (*supra*) was delivered in December 2017 while the sentence against the appellant herein was passed on 9th October, 2017. The trial court cannot therefore be faulted for passing the only sentence that was available for murder convicts at that time. Owing to the changes brought by the *Muruatetu* case, it is incumbent upon us to exercise our discretion and review the sentence imposed by the trial judge in order to determine its proportionality to the circumstances of the offence.

32. In undertaking the task before us we rely on the guidelines provided at Paragraph 71 by the Supreme Court in *Muruatetu* (*supra*). The Court stated that in considering the appropriate sentence to impose on a murder convict the trial court should take into consideration:

"(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) the possibility of reform and social re- adaptation of the offender;

(h) any other factor that the Court considers relevant."

33. We note that this is an offence that was committed against a person who had been tasked to restore some order which the appellant had disturbed. It appears the appellant was armed with the knife and went for a fatal stab against the deceased. During sentencing by the trial court, the appellant mitigated that he was a first offender and that he was taking care of his parents. In addition to the appellant's

mitigation, it is observed that the appellant was a youthful first offender. It is our view that the sentence to be imposed is one which at the end of the day will give the appellant a chance to re-engineer his life. In the circumstances, we find a sentence of 25 years imprisonment sufficient punishment.

34. The upshot of the foregoing is that the appeal on conviction is without merit and is hereby dismissed. The appeal against sentence succeeds. Consequently, the death sentence imposed on the appellant is set aside and substituted with a sentence of 25 years in prison. We observe that the appellant was remanded in custody throughout the

trial. His sentence will therefore run from 30th October, 2012 being the date he was first arraigned in court.

35. It is so ordered.

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

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR