



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gombe & 2 others v Republic (Criminal Appeal 140 of 2017)  
[2023] KECA 299 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 299 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 140 OF 2017  
PO KIAGE, F TUIYOTT & JM NGUGI, JJA  
MARCH 17, 2023**

**BETWEEN**

**SAMUEL OMONDI GOMBE ALIAS AGOK ..... 1<sup>ST</sup> APPELLANT**

**VITALIS OBULA OKENDO ALIAS DAKTARI ..... 2<sup>ND</sup> APPELLANT**

**HEZRON OTIENO OKENDO ALIAS OTIS ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Kisumu  
(Majanja, J.) dated 28th March, 2017 in HCCR NO. 51 OF 2012)*

**JUDGMENT**

1. The appellants were arraigned before the High Court at Kisumu and charged with murder contrary to Section 203 as read together with section 204 of the *Penal Code*. The particulars of the offence were that on July 19, 2012 at Karapul village, Siaya Township, Siaya district, within Nyanza province, the appellants jointly with others not before court murdered Meshack Owino Muhor (deceased).
2. The appellants denied the charge leading to a trial in which the prosecution called 5 witnesses in support of its case.
3. PW1, a wife to the deceased and the star witness in the case testified that between 18<sup>th</sup> and July 19, 2012 at night while asleep with her husband, three people forced themselves into their house and asked for her husband. The three had lit torches and she could recognise them. They were relatives and hailed from that same area. The three assailants woke up her husband and pulled him out of the house. Thereafter she heard them beating him as he screamed. The assailants then came back to the house to search for something that they did not find. The following day she went to her mother-in-law's house where some two women said that they had seen her husband lying on the road. PW1, proceeded to the



scene with her husband's mother (PW3) and brother (PW2) and found him unconscious. They took him to his mother's house and while planning to take him to hospital he passed away. This account that was confirmed by both PW2 and PW3.

4. PW4, a medical officer, testified that a post-mortem examination was conducted on the deceased's body at Siaya District Hospital mortuary. It revealed that the deceased had an occipital bruise at the back of his head, there was blood under the skin of his head but no fracture and there was subdural haematoma. The cause of death was found to be severe head injury secondary to the subdural haematoma which could have been caused by a fall on a hard surface or a blow with a blunt object.
5. PW5, the investigating officer stated that on July 17, 2012, he was instructed by his superior to investigate the case. He went ahead and recorded statements from witnesses and the accused persons. PW1 informed him that she was able to identify the assailants who invaded their house and she gave him their names.
6. At the close of the prosecution's case, the learned judge (Majanja, J) who had taken over the matter from Chemitei, J found the appellants had a case to answer and placed them on their defense. The appellants gave sworn statements and denied murdering the deceased. Their testimony was that on the night of July 17, 2012, they heard screams and a commotion outside their houses. When they came out they learnt from their neighbours that some thieves had stolen from a certain teacher. The appellants claimed that together with other neighbours they ran after the thieves and found one of the them with the stolen items. The thief named the deceased as his accomplice and the mob left him. On July 19, 2012, the appellants testified, the area chief called them and told them to report to the police station. There, they learnt that the deceased had been killed.
7. The learned judge evaluated the evidence tendered before the court and found the appellants guilty as charged. He sentenced them to death.
8. Aggrieved by that decision, the appellants preferred the instant appeal, based on a supplementary memorandum of appeal raising 8 grounds which, summarized, are that the judge erred by;
  - a. Failing to start the trial afresh in accordance with section 200 of the *Criminal Procedure Code* thereby infringing on the appellants' right to fair trial.
  - b. Relying on insufficient identification evidence to convict.
  - c. Failing to find that the prosecution did not establish the cause of death to the required standards.
  - d. Failing to find that prosecution failed to call crucial witnesses.
  - e. Failing to take into account the appellant's evidence.
  - f. Imposing a manifestly harsh and excessive sentence.
9. During the hearing of the appeal, learned counsel Mr Onsongo appeared for the appellants while the State was represented by Mr Okango, the learned senior principal prosecution counsel. Both parties had filed written submissions, which they sought to highlight.
10. Mr Onsongo argued that the trial court failed to warn itself on reliance on the evidence of a single witness in identifying the appellants. For this contention, counsel cited various decisions where this court has underscored the need for the court to examine identification evidence carefully to ensure that it was free from the possibility of error. Counsel disputed the evidence of identification by PW1. The



names that she gave to PW5, the police officer, were not the exact names of the appellants, save for the 2<sup>nd</sup> appellant whom she correctly identified.

11. Counsel faulted the prosecution for failing to call the area Assistant Chief who, according to him, was a crucial witness. We asked him whether the Assistant Chief was a witness to the incident to which he responded in the negative. Counsel further claimed that there was a mistrial in the High Court for the reason that when the learned Majanja J. took over the trial from another judge, and upon section 200 of the [Criminal Procedure Code](#) (CPC) being read to the appellants, the 1<sup>st</sup> appellant elected to have the matter start *de novo*, and the learned judge ordered so. However, counsel contended, the learned judge proceeded with the matter from where it had stopped and this prejudiced the 1<sup>st</sup> appellant. At this point the court drew Mr Onsongo's attention to the fact that counsel who represented the appellants at the trial court seemed to have conceded to the trial continuing from where it had stopped, as opposed to starting afresh. Counsel's response was that the ceding by his colleague made no difference as there was already a mistrial.
12. Mr Onsongo further asserted that PW1 was an unreliable witness as she contradicted herself in her evidence. For instance, counsel argued that while the witness testified that the persons who invaded their house did not talk to her, she later stated that they told her that they were going to kill her husband and she would remain a widow, and that she should find a place to go to.
13. On sentencing, counsel urged that in view of the appellants' mitigation and the Supreme Court decision in [Francis Karioko Muruatetu & another v Republic & 4 others](#) [2017] eKLR, the court should consider setting aside the death sentence and imposing a suitable sentence taking into account the period of time already served by the appellants in prison.
14. In reply, Mr Okango asserted that the appellants' right to fair trial was not violated in any way considering that section 200 of the [CPC](#) is not couched in mandatory terms. The succeeding court has discretion to choose how to proceed; whether to begin *de novo* or continue with the case where it had stopped where the case starts afresh, the right of an accused person that accrues is to demand the recall of any witness. In any event, counsel argued, it was not enough for the appellants to allege that article 50 of the [Constitution](#) had been violated without specificities on which components of the article had been violated.
15. Respecting the contention that PW 1 was unreliable as she contradicted herself in examination in-chief, Mr Okango urged that PW1 was a credible and reliable witness. He referred to the trial court's observation that nothing had been suggested to her in cross-examination to warrant a conclusion that she was untruthful or that she had a grudge against the appellants. Moreover, the court found PW1's testimony truthful and believable. Additionally, it was submitted that the alleged contradictions were made in cross-examination and since in cross-examination a witness responds to specific questions, PW1's answers could not be taken as contradictory where the specific questions she was responding to were not indicated. The prosecuting counsel further contended that the appellants had not shown how failure to call the assistant chief as a witness prejudiced their case.
16. Next, it was submitted that the trial court correctly apprised itself on the law regarding identification by a single witness and reached a sound finding on the question of identification. In any case PW1 recognised the appellants as people she knew by their aliases, the names by which they were commonly referred. Throughout the trial the appellants never challenged those names as not referring to them. Counsel defended the holding of the trial court that the appellant's common intent of dragging the deceased outside his house and having him hit with a blunt object made them all culpable. Concerning sentencing, while conceding that the sentence imposed was harsh in view of the apex court's decision



in Francis Karioko Muruatetu (*supra*), counsel, urged that the matter should be remitted to the High Court for resentencing.

17. We have considered the record of appeal as well as opposing counsel’s submissions. We appreciate our role as a first appellate court as was stated in Reuben Ombura Muma & another v Republic [2018] eKLR;

“This being a first appeal, our mandate as an appellate Court is to analyze and re-evaluate the evidence, being mindful of the fact that, the trial court had the advantage of seeing and assessing the demeanor of the witnesses.”

18. We have distilled the issues to be considered as whether there was a mistrial, whether the prosecution proved its case beyond a reasonable doubt and whether the sentence imposed should be reduced in view of the determination in Francis Karioko Muruatetu (*supra*).

19. The appellants complained that there was a mistrial as, when section 200 of the CPC was read to them, the 1<sup>st</sup> appellant chose to have the matter start *de novo* but in the succeeding judge continued from where his predecessor had ceased taking evidence. The appellants contend that on account of that omission their right to fair trial was infringed upon. The respondent resists that claim asserting that the section gives the trial judge a discretion to choose how to proceed, whether to start *de novo* or continue from where his predecessor stopped. It is only after the court makes that election that the accused person’s right arises, specifically, the right to resubmit a witness. The pertinent part of section 200 provides thus;

“200. Conviction on evidence partly recorded by one magistrate and partly by another

1. Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may;

- a. deliver a judgment that has been written and signed but not delivered by his predecessor; or  
b. where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resubmit the witnesses and recommence the trial.

...

- (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resubmitted and reheard and the succeeding magistrate shall inform the accused person of that right.

20. A plain reading of the provision lends itself to the interpretation suggested by the prosecuting counsel, that is, upon the learned judge commencing the hearing afresh, the appellants would have been entitled to have any of the witnesses that had already testified resubmitted. However, we note that after



the investigating officer gave his evidence on November 16, 2016, the prosecuting counsel made an application stating;

“In light to the evidence of the investigating officer. I urge the court to reconsider its direction under section 200 of CPC.”

Counsel for the appellants, Mr Adiso responded;

“I leave the issue to the court”

The court ordered;

“In view of the evidence of the investigating officer. I set aside my earlier order to start the matter afresh. It shall be deemed to have continued”.

In the circumstances we do not think that there was a mistrial in the matter. Neither was the appellants’ right to fair trial violated in any way.

21. The appellants further allege that; the trial court relied on insufficient identification evidence, the prosecution did not establish its case to the required standard and that the learned judge failed to take into account their evidence. It is trite that the evidentiary threshold in criminal matters is beyond a reasonable doubt. It is therefore the responsibility of the courts to ensure that the prosecution attains this threshold before a conviction is returned against an accused person. Thus the prosecution must at all times prove the concurrence of mens rea and actus reus. This Court pronounced itself on this in Joseph Kimani Njau v republic [2014] eKLR as follows;

“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard.”

22. The appellants challenge PW1’s evidence of identification claiming that she did not participate in identifying the assailants, and that the names she gave to the police officer were not in respect of them. However, and contrarily, the record indicates that PW1 identified the appellants by their aliases and noted that they were relatives to the deceased. This evidence remained uncontroverted during trial. We are therefore satisfied that the identification of the appellants was by way of recognition and the learned judge did not err in holding that the appellants were positively identified by PW1. We reiterate the strength of identification by recognition as stated by the court in Hashon Bundi Gitonga v Republic [2016] eKLR;

“It is trite law that 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. See: Anjononi & Others v Republic [1980] KLR 59.”

23. The appellants having been positively identified as they worked in concert to drag the deceased out of his house, we agree with the learned judge that they had a duty to explain what happened to the deceased who was found dead the following morning.



24. On the second limb of mens rea, this is a very crucial ingredient in a charge of murder as without it a conviction cannot be entered against an accused. This has been provided for in section 203 of the Penal Code as;

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

Malice aforethought is defined in section 206 of the Penal Code as;

- “(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.”

25. PW1’s evidence was that the appellants forced their way into their house and dragged the deceased out. She thereafter heard him screaming. The next morning the deceased was found lying on the road unconscious. The post-mortem report revealed that he had a severe head injury which could have been caused by a fall on a hard surface or a blow with a blunt object. From the foregoing evidence, it is clear that the assailants, positively identified as the appellants, intended to cause the death of, or at the very least grievously harm the deceased. We are therefore satisfied that the mens rea of the appellants was proved beyond a reasonable doubt. The learned judge did not err in holding that the nature of injuries suffered by the deceased subsequent to his being dragged from his house is consistent with his being killed unlawfully actuated by malice aforethought.

26. In sum therefore, we find that the conviction of the appellants was sound and we shall not interfere therewith.

27. Finally, we note that the appellants were sentenced to death. It is trite that sentencing is at the discretion of the trial court and the Supreme Court in Muruatetu (*supra*) brought to light the importance of judicial discretion in the determination of sentences.

Considering that there was no depravity nor any aggravating factors in the matter, we are inclined to interfere with the sentence meted out by the learned judge as being excessive in the circumstances, including the mitigation given by the appellants who were first offenders and remorseful.

28. In the result, this appeal succeeds on sentence only. We set aside the sentence to life in prison and substitute therefor a term of fifteen (15) years imprisonment to run from the date the appellants were first sentenced.

Order accordingly.

**DATED AND DELIVERED AT KISUMU THIS 17<sup>TH</sup> DAY OF MARCH, 2023.**

**P. O. KIAGE**



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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

