



**Loitareng v Republic (Criminal Appeal 116 of 2018)
[2023] KECA 276 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 276 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 116 OF 2018
F SICHALE, LA ACHODE & WK KORIR, JJA
MARCH 17, 2023**

BETWEEN

NGULIMANG LOITARENG APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment of the High Court at Kapenguria (S.M. Githinji J) delivered on the 1st November, 2017 In Criminal Case number 4 of 2016)

JUDGMENT

1. This appeal arises from the conviction and sentence of the appellant Ngulimang Loitareng in a judgement dated 1st November, 2017 by S.M. Githinji J.
2. The appellant 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 are that on the 2nd of August, 2014 at around 6.00 p.m at Chesomburi area in Weiwei Location within West Pokot County, the appellant murdered Chelekwang Amuket (the deceased).
3. Briefly put, the facts of the prosecution's case were that the appellant, the deceased, Cheptamu Longiro (PW1), Chelimo Cheposopon Cheptai (PW2) and Esther Cheptoo (PW3) were all neighbours, who knew each other well. On 2nd August, 2014 at about 2p.m, PW2 went to Chetera River to brew the local illicit liquor known as chang'aa. She was joined in the exercise by PW1, PW3, mama Chemwok Domoita and the deceased.
4. The appellant arrived at the scene later and berated them for what they were doing and attempted to spill the illicit brew, but was prevented by the deceased. As a result, the two exchanged harsh words. According to PW2 and PW3 the appellant warned the deceased that he would be arrested and taken to



- Kapenguria to serve as an example to other chang'aa brewers. According to PW1 however, the appellant actually threatened to kill the deceased before he went away.
5. At about 7.00 p.m, PW2 rewarded those that had been helping her with some alcohol to take home and they all dispersed. PW2 and Chemwok Domoita went in the same direction since their homes were on the same side of river Chetera. The rest crossed the river led by the deceased, with PW1 following him and PW3 trailing behind. PW1 and PW3 testified that as they were walking, the appellant suddenly emerged from the bush armed with a stick and hit the deceased on the back of the head. The deceased fell down whereupon the appellant twisted his neck. The two witnesses ran away after witnessing the incident. Their testimony was that there was half-moon and ample light which enabled them witness the incident.
 6. The following day they learnt that the deceased's dead body had been found in the river. The body was later retrieved by the police officers.
 7. A Post mortem was done on the body on 5th August, 2014 by Dr. Rono and the report he prepared was produced by Dr. Jotham Mukhola (PW4), on his behalf in court. The report indicated that the head of the deceased had multiple scalp haematoma, underlying the bruises. That there was dislocation of cervical spine at the level of C3. PW4 explained that cervical is the upper part on the neck and C3 is the third one from top. He explained that it could have been caused by trauma from the top, or a twist of the neck. The conclusion of the Doctor was that the deceased died as a result of acute spinal cord injury, consistent with physical strangulation.
 8. When put on his defence, the appellant opted to give unsworn testimony. He stated that on the material day, at about 4p.m he left home and went to the river to take a bath. At the river he found people drinking illicit brew, he chided them since it was illegal to do so but they heeded him not as they were drunk. He left them and went home. On 23rd August, 2014 he was arrested without being told the reason for the arrest. It was not until the 25th of August, 2014 that he was informed that all his animals had been taken away and his family members chased away from home, as is the practice in Pokot tradition because he was now a murder suspect. He maintained that he did not kill any one and that he is a Kenya Police Reservist.
 9. Upon considering the evidence before him, the learned Judge found that the offence of murder was proved against the appellant beyond reasonable doubt. He convicted him in accordance with section 203 as read with section 204 of the *Penal Code* and sentenced him to death stating that despite the appellant's mitigation, that is the only sentence provided under section 204 of the *Penal Code*.
 10. The foregoing judgment did not appease the appellant's grievance and he filed the present appeal on the grounds that:
 - a. The learned trial judge erred in law and fact by relying on half moon light to belief that PW1 and PW3 properly identified the appellant
 - b. The learned trial Judge erred in law and fact by failing to note that PW1 and PW3 were drunk at the time of the incident having been brewing chang'aa during the day.
 - c. The learned trial judge erred in law and fact by relying on evidence of the prosecution witnesses which was so contradictory and full of discrepancies to be relied upon and convict the appellant.
 - d. The learned trial judge convicted the appellant without considering his defence.



- e. The learned trial judge erred in law and in fact by relying on incredible witnesses to convict the appellant.”
11. This appeal was disposed of by way of written submissions that were orally highlighted in the virtual Court.
 12. M/s Towett Tito & Co. Advocates relied on their submissions dated 2nd December, 2022 to submit on behalf of the appellant that he was a police reservist, who were unpaid and served as the main security force in rural Kenya. That section 66 of the National Police Service Act No. 114 of 2011 speaks about protecting the police from personal liability. It is submitted that the argument between the appellant and the deceased ensued due to the illegal brewing of chang'aa and that the appellant only warned the deceased that he would take action against them and left. When he came back, the deceased and the prosecution witnesses had completed the brewing that they had been warned about and this provoked the appellant to do what he did. In his view he acted within his line of duty.
 13. Counsel contends that from the testimony of PW1 the event took place at around 9p.m, and she relied on bright moonlight to identify the appellant while PW2 stated that though she did not witness the killing, there was no moonlight on the night in question. They relied on Aloyo Ewoi v Republic, Criminal Appeal 32 of 2016 eKLR, Wamunga v Republic (1989) KLR 424 and Kiarie vs Republic (1984) e KLR 739 where this court held that evidence of identification/recognition at night must be absolutely watertight to justify a conviction.
 14. Counsel submits that according to the testimony of PW1 the appellant drunk some of the alcohol with her. As such the altercation between the appellant and the deceased took place only after the appellant was intoxicated and that intoxication negates mens rea as was held in Rex v Retief (1940-1943) EA 71 and Said Karisa Kimunzu v Republic, CR App No. 266 of 2006 (Msa).
 15. It is also submitted that the prosecution evidence was contradictory so that whereas PW1 stated that the appellant threatened to kill the deceased, while PW2 stated that the appellant threatened to arrest and charge the deceased. Further, that whereas PW3 stated that the deceased was attacked while on their way home by someone who emerged from the bushes and hit the deceased, on the contrary, PW5 testified that he found the body of the deceased in the middle of the river with his head facing down.
 16. Relying on Francis Karioko Muruatetu and another v Republic (2017) eKLR, it is argued that the conviction and sentence by the learned trial Judge is bad in law.
 17. In opposition, Ms. Okok submits through the submissions dated 2nd December, 2022 filed on behalf of the respondent, that PW1, PW2 and PW3 placed the appellant at the scene of crime. That PW1 and PW3 gave direct evidence as they saw the appellant assault the deceased using a stick. That the testimony of PW3 corroborated the evidence of PW1 by confirming that the appellant hit the deceased on the head using a stick that he was armed with and tried to strangle him and PW4 later confirmed that the cause of death was acute spinal cord injury consistent with physical strangulation.
 18. On identification, counsel argues that it was by way of recognition as the appellant was well known to PW1 and PW3. That even though PW1 and PW3 used the half moonlight to identify the appellant, this is not fatal as the appellant was someone who was well known to them. They had seen him the very same day a few hours before the incident. Furthermore, that the appellant had the motive or cause to attack the deceased especially after the bitter confrontation between them a few hours earlier. As such, she asserts that the identification of the appellant based on recognition was therefore, free from error.



19. Counsel urges that it is evident from the evidence of PW1 and PW3 that the appellant had malice aforethought, when he attacked the deceased as can be seen in the fact that the appellant did not only hit the deceased with a stick, but he also strangled.
20. Counsel submits that there are no contradictions or inconsistencies in the prosecution evidence and even if there are, they are minor and do not go to the root of the prosecution case, hence this Court should ignore them.
21. On sentence, it is argued that the sentence was before the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* SC Petition No.15 as consolidated with Petition No.16 of 2015, which held that the mandatory death penalty as provided under section 204 of the Penal Code is unconstitutional as it deprives the courts of discretion to impose an appropriate sentence depending on the particular circumstances of each case. Be that as it may, counsel concedes that the death sentence was harsh in the circumstances and urged this Court to quash it. Counsel proposes that it be substituted with a sentence of thirty years imprisonment to run from the date of conviction.
22. We have considered the record of appeal, the rival submissions and the law. This being the first appeal, the duty placed on this Court was captured in *Irene Nekesa Peter v Republic* [2014] eKLR, thus:

“.....we are under a duty to re-examine and re-evaluate the evidence on record with the aim of reaching our own conclusions, subject to the caveat, however, that we had no advantage, as the trial court did, of seeing and hearing the witnesses.”
23. In the supra case, this Court was following the principles set out in the often-cited case of *Okeno v R* (1972) EA p.32 at p.36 where the Court observed that-

“ An appellate on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v r* (1957) EA p.336) and to the appellate court’s own decision on the evidence and draw its own conclusion. (*Shantilal M. Ruwala v R* (1957) E.A p.570). It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday* (1958) EA p.424”
24. We have therefore subjected the evidence herein as a whole to a fresh and exhaustive examination and in our view, the issues that fall for consideration are:
 - a. Whether the prosecution proved all the elements of murder beyond reasonable doubt.
 - b. If (a) is in affirmative, whether the sentence meted upon the appellant is unconstitutional.
25. The appellant was charged with murder contrary to section 203 as read together with section 204 of the *penal code*. Section 203 of the Penal Code provides that:

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



26. In this Court's decision in *Anthony Ndegwa Ngari vs Republic* [2014] eKLR, the elements of the offence of murder were listed as follows: -

- “(a) the death of the deceased occurred;
- b. that the accused committed the unlawful act which caused the death of the deceased; and
- c. that the accused had malice aforethought.”

27. Looking at the evidence before us, PW1, PW3 and PW4 testified to the fact that what caused the death of the deceased was unnatural. PW1 and PW3 witnessed the deceased being hit with a stick and being strangled. PW4, the doctor, corroborated the evidence of PW1 and PW3, when he assigned the cause of death of the deceased to acute spinal cord injury, consistent with physical strangulation. From the foregoing evidence therefore, it is clear that the deceased's premature exit from this world was aided by a killer.

28. It is not contested that the deceased met his death in the evening at about 7 pm. For this reason, the appellant contends that the intensity of the light was not interrogated in the trial court, for the court to determine whether indeed, there was enough light to enable PW1 and PW3 witness the act as they alleged. On the other hand, the respondent contends that there was half-moon whose light enabled PW1 and PW3 to witness the incident. Further, that this was not an act of mere identification but of recognition as the appellant was well known to them, and they had seen him just some few hours before the incident.

29. The record indicates that the trial court pronounced itself on the issue of identification as follows:

“It is not in dispute that the accused went to the place and was inclined to pour the brewing chang'aa. The deceased prevented him. The accused and the deceased had a bitter exchange as a result. The accused threatened to have the deceased arrested and charged in Kapenguria. He left. However, as the rest were going home, he emerged from the bush and attacked on the deceased (sic) with a stick on the head from behind, and while he was down twisted his neck or strangled him. PW1 and PW3 witnessed this incident. Though the source of light was not the most reliable as they used half-moon light to see, the fact that they both knew the accused very well as a neighbour, had seen him the very same day a few minutes or hours before, and he had the motive or cause to attack the deceased, leaves no doubt that he is the one who attacked him, and inflicted injuries which led to his death.”

30. In *Wamunga versus Republic* (1989) KLR 424 the Court of Appeal spoke of the evidence of identification generally in the following terms:

“It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

31. In the present case, PW1 and PW3 testified of witnessing the appellant hitting the deceased with a stick on the head and then strangling him. The appellant was well known to them as he was their neighbour, and had earlier come to where they were brewing the illicit alcohol and exchanged harsh words with the deceased when the deceased prevented him from pouring out the illicit brew.



32. The question of balancing the assessment of evidence of witnesses when it comes to identification in the night spans ages and cuts across all manner of crimes. As was held decades ago in Anjononi and Others vs The Republic [1980] KLR;

“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, 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”

33. Further, in Peter Okee Omukaga & Another v Republic [2011] eKLR, this Court held on the evidence of recognition at night that:

“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours’ from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non- recovery of the stolen items did not in any way point to the innocence of the appellants.”

34. We are of the view, in the present case, that the trial Judge rightly found there was no error in the recognition of the appellant by PW1 and PW3 as the perpetrator.

35. We note that the appellant cannot seem to make up his mind what his defence should be. To begin with, he denies that he killed anyone and that his identification at the scene of crime was erroneous. He then moves on to urge this Court to find that he did what he did in the line of duty when the incident occurred and is therefore protected from personal liability in accordance to section 66 of the National Police Service Act. Lastly, he pleads provocation by the deceased and his companions, since he asked them to stop brewing the illicit alcohol, but they went against his warning and completed brewing it.

36. We have already dismissed the first line of defence because the evidence places him squarely at the scene of crime. We therefore revisit the evidence to trace the sequence of events that unfolded on the night of infamy, to establish whether the appellant can take refuge under the provisions of the law on the basis of any of the other two prongs of his defence.

37. Section 66 of the National Police Service Act provides that:

- (1) No matter or thing done by a member, employee or agent of the Service shall, if the matter or thing is done in good faith for the performance and execution of the functions, powers or duties of the Service, render the officer, employee or agent personally liable to any action, claim or demand whatsoever.

38. The appellant had an altercation with the deceased, and left hours before the ignoble deed. He however lay in wait along the path the hapless man would take on his way home and when the deceased came by, he sprung out of the bushes and felled him with one blow to the back of the head. That was not



sufficient to quell his desire for revenge against the deceased who had dared to thwart his attempts to pour out the sweat of their labour. The evidence goes on to show that he sat on the deceased who was lying helpless on the ground and strangled him by twisting his neck. That most likely is the moment the deceased's life was snuffed out.

39. The scenario portrayed above by the evidence of the two eye witnesses leaves no room to argue that the appellant was acting in good faith for the performance and execution of his duties as required under Section 66 of the *National Police Service Act*, in order to avail him the protection of that provision.

40. On provocation, section 207 of the *Penal Code* provides as follows:

“When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.”

41. Section 208 of the said Act defines provocation as:

“(1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”

42. In the case of *Peter King'ori Mwangi & 2 others v Republic* [2014] eKLR this Court stated as follows with respect to the defence of provocation:

“We start from the premises (sic), that provocation is not a complete defence that if advanced and proved would entitle the accused to an automatic acquittal. It is a partial defence, the effect of which is to leave it open to court to return a verdict of guilty to manslaughter if the court is satisfied the killing was as a result of provocation. So, what is provocation? In the case of Duffy [1949] I ALL ER 932; provocation was defined as “some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind ...” (Emphasis ours)

43. The operative words here are sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind. In the instant appeal PW2 testified that the appellant was angered by the altercation between him and the deceased when he left. He does not seem to have gone away completely or if he did, he came back later after some hours and lay in wait and attacked the deceased. We are of the view that when the appellant left, he had ample time for his passion to cool, therefore his actions of attacking the deceased were not carried out in the heat of passion.

44. The foregoing notwithstanding, do the actions of the appellant demonstrate the presence of malice aforethought? The evidence is that as the appellant waited for the deceased, he was now armed with a stick with which he later hit the appellant and immobilized him and then he wrung his neck. In the case



of Daniel Muthee vs Republic Criminal Appeal No. 218 of 2005 (UR) cited in the case of *Republic vs Lawrence Mukaria & another* [2014] eKLR, Bosire, O’kubasu and Onyango Otieno JJA., while considering what constitutes malice aforethought observed as that:

“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.”

45. The nature of the injuries sustained by the deceased in the instant appeal and which led to his death left no doubt that the appellant intended to cause his death or at the very least, grievous harm. We are therefore satisfied that the appellant acted with malice aforethought.

46. The appellant also submitted that the prosecution case was inconsistent and contradictory, while the respondent argued that if there are inconsistencies in their case, they are minor and do not go to the root of the prosecution’s case hence this Court should ignore them. We agree with the respondent that the inconsistencies herein are so minor as not to cause any dent in the prosecution’s case.

47. We now turn to the sentence imposed upon the appellant. The appellant was sentenced according to section 204 of the Penal Code, which imposes mandatory death sentence on conviction for murder. The appellant contends that the sentence is bad in law. The respondent has conceded and proposes a sentence of thirty years. They both rely on the supreme court celebrated case of *Francis Muruatetu & another v Rep.*, the Supreme Court of Kenya Petition No. 15 and 16 of 2015.

48. The counsel who represented the appellant in the High Court, Mr. Abari, mitigated on behalf of the appellant as follows:

“He is remorseful. He has a wife and a family and he is the sole breadwinner. We pray for a lenient sentence”

49. The learned Judge considered the appellant’s mitigation and held as follows:

“I have considered the mitigation. However, under section 204 of the Penal Code there is only one sentence provided for the offence which is death. It is the sentence I pronounce against the accused”

50. In *Muruatetu supra*, the Court in regard to the application of mitigation by the accused before sentencing, held as follows:

“It is during mitigation, after conviction and before sentencing, that the offenders’ 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 than censure or on the converse, impose the death penalty.”

In the end we find that although the sentence imposed by the High Court is not unconstitutional, courts are increasingly frowning at death sentences that leave the prisoners with no hope. We are therefore inclined to exercise our discretion in favour of the appellant and give him a definite sentence.

51. Consequently, we find no reason to disturb the appellant’s conviction for the offence of murder arrived at by the trial court and uphold it. We however allow the appeal against the sentence and set aside the



sentence of death imposed upon the appellant, and substitute therefore a sentence of twenty-five (25) years imprisonment to run from the date of the appellant's conviction by the High Court.

DATED AND DELIVERED AT NAKURU THIS 17TH DAY OF MARCH, 2023.

F. SICHALE

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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.

Signed

DEPUTY REGISTRAR

