Nyambura v Republic (Criminal Appeal 105 of 2020)
[2023] KECA 279 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 279 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 105 OF 2020

MSA MAKHANDIA, S OLE KANTAI & GWN MACHARIA, JJA

MARCH 17, 2023

BETWEEN

BANCY MUKAMI NYAMBURA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal against the judgment of the High Court of Kenya at Nairobi (Lesiit, J.) delivered on 20th December 2016 in Criminal Case No. 72 of 2014)

JUDGMENT

1. The appellant was charged with the offence of murder contrary to Section 203 as read together with Section 204 of the *Penal Code*. The particulars were that she murdered James Mwangi Maina on July 26, 2014 at Hilton area, Gitambaa Village in Ruiru District within Kiambu County. During trial, the prosecution called six witnesses while the appellant gave a sworn statement and called no witnesses. At the conclusion of the trial, she was found guilty, convicted and sentenced to suffer death.

2. As this is a first appeal, we are required in law to re-evaluate the evidence and make our own conclusions. We have to bear in mind though that, since we are not a trial court, we did not see or hear the witnesses testify and so cannot gauge their demeanor for which we must give due allowance. This was emphasized in the case of *Okeno vs Republic (1972) EA 32* at 36 thus:

> ' An appellant 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 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M Ruwala v R, [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and 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 Post, [1958] EA 424.'

3. We accordingly summarize the evidence adduced before the trial court as follows: The appellant and the deceased had been cohabiting as wife and husband at the time of the deceased's death, and together they had one child. The deceased also had an older daughter from his first marriage, one Michelle, who visited them occasionally. According to PW1, Miriam Wanjoki who was living in Ruiru where the appellant too lived, on the night of the incident, the appellant and the deceased returned to their one-bedroomed house at around 11:00pm and found PW1 in the sitting room with the deceased's older daughter and the couple's toddler son. Both were drunk and quarrelling. The quarrel escalated into a fight in their bedroom, they then went outside where they continued to fight. Two minutes later, PW1 saw the appellant return into the house with a bleeding injury on one of her cheeks. The appellant went to the kitchen, took a knife then went back outside and locked them (PW1 and the two children) in the house. After a short while, she returned into the house again with blood on her hands. She took her son from PW1 and went back outside. PW1 followed her outside and saw the deceased lying on the ground.

4. The couple's neighbours, PW2, Richard Mogaka Mose and PW4, John Marwa Neo heard people conversing loudly outside while in their respective houses. They went outside and found the appellant lying on the ground in bloodstained clothes. PW2 rang the residential plot caretaker PW3, Absalom Jumba Kamasi and informed him about the incident. He then called a matatu operator, who arrived with a vehicle that they used to ferry the deceased to the hospital. PW2 together with the appellant, her toddler son, PW1 and PW4 went to Ruiru Police Station to report the incident but were advised to first take the deceased to Ruiru sub-District Hospital for treatment and then go back to make a formal report. At the hospital, the deceased was pronounced dead by the doctor before receiving any treatment. PW2 overheard the appellant telling the doctors that she was the one who murdered the deceased. 'Ni mimi ndiye nimemuua,' she said.

5. PW3 and the investigating officer PW5, PC Samuel Kemboi attached to Ruiru Police station, later joined them at the hospital.

   PW2, PW3 and PW4 took the body of the deceased to Kenyatta University Funeral Home. The appellant received treatment for the injury on her left cheek then PW5 arrested her and escorted her to the police station. A formal report of the incident was then made at the station after which he and his colleague visited the scene of crime at 2:30am on the same night. They found that neighbours had already washed away the blood. They searched the scene and found a bloodstained penknife, which they suspected had been used as the murder weapon in the incident. He later recorded statements from witnesses.

6. On July 28, 2014, PW5 accompanied the deceased's family members to Kenyatta University Mortuary to identify the body for post-mortem, which was performed by Doctor Johansen Oduor. The doctor did not testify but the post mortem report was adduced in evidence by PW5 by consent of both the prosecution and defence. Externally, the deceased's body had two stab wounds and bruises on the elbow and lower back. Internally, it had a perforated left diaphragm and heart. The doctor concluded that the cause of death was chest injuries due to penetrating trauma.

7. PW5 collected blood samples from the deceased during the post- mortem and took the appellant to the doctor to have her blood samples taken. He sent the blood samples alongside the recovered penknife as well as buccal swabs and fingerprints of the deceased to the Government Chemist for DNA analysis to establish the origin of the blood stains on the penknife. According to PW6, Dr Elizabeth Waithera,

a Forensic Analyst from the Government Chemist, upon analysis, the bloodstain from the penknife did not generate any DNA profiles. Thereafter, PW5 charged the appellant with murder.

8. In her defence, the appellant recalled having had an altercation with the deceased on the material night over his older daughter's behaviour, but denied killing him. It was her testimony that, that evening, the deceased requested her to take to him his jacket to a nearby club. When she got there, she found the deceased drinking alcohol and the deceased gave her Redbull which is a non- alcoholic drink. They went back home at 9:00pm that night whereupon their housemaid, PW1, informed her that Michelle, the deceased's daughter had returned home at 7:00pm. Michelle had left the house in the morning and efforts to trace her through her mother had born no fruits. When she tried to advice Michelle about the dangers of staying out late, the deceased accused her of not loving his daughter. He hurled insults at her and threatened to kick her out of the house. She decided to go out to get milk to give him some time to calm down but the deceased followed her and cut her on the face with a penknife from behind. She collapsed and passed out, only to regain consciousness the following morning at Ruiru Police Station with her face stitched and bandaged.

9. The trial court having considered and weighed both the prosecution and appellant's case, found that the prosecution had proved its case beyond reasonable doubt, convicted and sentenced her as already stated. Dissatisfied with the conviction and sentence, the appellant is now before this Court on first appeal based on the following summarized grounds: that the key elements of the offence of murder were not proved beyond reasonable doubt; that the trial court failed to adhere to the principles of circumstantial evidence; that the trial court disregarded the appellant's defence; and that the trial court meted out a harsh, unfair and excessive sentence that did not take into account the mitigating circumstances.

10. The appeal was canvassed by way of written submissions with limited oral highlights. Learned counsel, Mr Muga for the appellant submitted that the prosecution did not prove its case to the required standard, as they did not establish all the essential ingredients of the offence of murder. Counsel contended that the circumstantial evidence did not point to the guilt of the appellant as it presented other hypotheses and/or inferences other than that the appellant was guilty. In this respect, he submitted that firstly, the possibility that a third party could have committed the offence was quite high since there was no eye witness to the offence. Secondly, PW1 testified that the appellant's level of intoxication on the material day was such that she could not have physically handled the deceased if a fight ensued. Thirdly, the alleged murder weapon did not generate any DNA profile belonging to either the appellant or the deceased; and lastly, the appellant did not flee from the scene after the incident. Counsel also urged the Court to consider the possibility that PW1 may have given false evidence since she was bitter with the appellant for not having been paid her dues after employing her as a house help.

11. Further, counsel contended that the prosecution did not establish mens rea on the part of the appellant. He argued that if indeed the appellant caused harm to the deceased as alleged, it was an unintentional act of self-defence. Accordingly, the offence of murder ought to have been reduced to that of manslaughter.

12. In rebuttal, the respondent through learned Prosecution Counsel, Ms Matiru, urged that the appellant's conviction be upheld as the case was proved beyond a reasonable doubt. She however urged us to relook at the sentence pursuant to the Supreme Court case of *Francis Kariokor Muruatetu & Another vs Republic [2017] eKLR*.

13. We have considered the evidence, grounds of appeal, respective rival submissions and the law. The issues that commend themselves for determination are the fact and cause of the death of the deceased, whether the circumstantial evidence pointed to the appellant's guilt and if so, whether she had the

necessary malice aforethought in causing the death of the deceased; and, whether the sentence meted out against the appellant was harsh and excessive in the circumstances.

14. On the first issue, there is no contestation as to the fact of the death of the deceased and its cause. This was confirmed through the post mortem conducted by Dr Oduor at the Kenyatta University Mortuary which exercise was witnessed by amongst others, PW1 and PW5. The opined that the cause of death was chest injuries due to penetrating trauma. This then behoves us to consider whether the appellant had a hand in the death of the deceased.

15. The appellant was no doubt linked to the death of the deceased by circumstantial evidence. This Court has established and restated the principles applicable in founding a conviction based on circumstantial evidence. For instance, in *Rex v Kipkerring Arap Koske & 2 Others [1949] EACA 135*, *Simoni Musoke v R [1958] EA 71*, *Abanga alias Ongango v Republic Criminal Appeal No 32 of 1990 (UR)* and *Joan Chebichii Sawe v Republic [2003] eKLR*, the principles enunciated therein are that; to justify the inference of guilt, the evidence must irresistibly point to accused as the perpetrator of the crime; inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt; and the chain of events must be so complete that it establishes the culpability of the appellant, and no one else.

16. This Court in *PON v Republic [2019] eKLR* stated thus:

> ' To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that guilt of the suspect should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the suspect not guilty.'

17. In our considered view, the inculpatory facts that arise from the circumstantial evidence herein are that, PW1 witnessed the appellant and the deceased having an altercation that escalated to a physical fight inside and outside the house. The appellant walked back into the house and was seen picking a knife before returning outside. Shortly thereafter, she went back again with blood on her hands only for the deceased to be found outside moments later, lying unconscious while soaked in blood. Further, according to the post-mortem report, it was confirmed that the deceased indeed had two stab wounds on his chest and his death resulted from chest injury due to penetrating trauma. Indeed, we agree with the learned trial Judge that the appellant's defence that she passed out upon being attacked on the face by the deceased was an afterthought as it only came up during defence hearing. She never raised it at all at the cross examination of key witnesses especially PW1. That notwithstanding, her defence was dispelled by the testimonies of PW1, PW2, PW4 and PW5 who confirmed that she accompanied them to the hospital while she was fully conscious.

18. Further, we reject the appellant's contention that the appellant may have been stabbed by a third party since the murder weapon did not have her DNA or that of the deceased. PW6, the Government Analyst explained in her testimony that the reason as to why DNA profile could not be generated from the blood stain on the knife was either because the blood came into contact with a strong substance such as detergent or interference. We find that explanation reasonable as it was consistent with PW5's testimony that upon visit to the scene of crime, he found the scene had been interfered with, the blood stains on the ground having been washed away. In addition, it is evident from the trial court's proceedings that the DNA analysis was conducted two years since the collection of samples which may have increased the chances of interference. Moreover, we find that the possibility that PW1 may have incriminated the appellant out of bitterness is farfetched as her evidence was well corroborated by PW2 and PW4.We add that, although PW2 alluded to hearing the appellant telling doctors in hospital

where deceased was rushed to that she killed the deceased, his evidence was nothing more than hearsay evidence. This is because no doctor was called to corroborate the evidence. As such, the same could not be relied upon as proof of the appellant's culpability.

19. The totality of the foregoing is that, despite lack of direct evidence, the circumstantial evidence irresistibly pointed to the appellant and no other person as the person who inflicted the stab wounds that killed the deceased.

20. We now delve into whether the appellant had malice aforethought in inflicting the fatal injuries. Section 206 of the Penal Code provides that:

> ' 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.'

21. This Court in *Nzuki vs Republic [1993] eKLR* expounded on the ingredients for malice aforethought by stating thus:

> ' Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:
>
> i. The intention to cause death;
>
> ii. The intention to cause grievous bodily harm;
>
> iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts.
>
> It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.
>
> Without an intention of one of these three types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder. See the case of Hyam v Director of Public Prosecutions, [1975] AC 55.'

22. The appellant claims that she was intoxicated. Section 13 of the Penal Code provides as follows regarding the defence of intoxication:

> ' (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
>
> 2. Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –
>
> a. The state of intoxication was caused without his consent by the malicious or negligent act of another person; or
>
> b. The person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
>
> 3. Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.
>
> 3. Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
>
> 3. For the purpose of this section, 'intoxication' includes a state produced by narcotics or drugs.'

23. The trial judge in dealing with this issue held that:

> ' 44. I find that the accused was in full control of her senses at the time of this incident. She went in to get the knife she used to stab the deceased. Having walked back to the house to pick the knife and then using it to stab the deceased twice in the chest is proof that she had made up her mind to cause either death or grievous harm to the deceased.'

24. The threshold for a defence of intoxication is simple; it shifts the burden of proof on the accused person to prove that, by reason of intoxication at the time of the act or omission complained, he or she did not know what he or she was doing was wrong or altogether did not know what he or she was doing. The law does however qualify the nature of intoxication; firstly, the state of intoxication must have been caused without the accused's consent by the malicious or negligent act of another person; and, secondly, the accused person was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission. We then grapple with the question of, whether the appellant passed this test.

25. We entirely agree with the reasoning of the trial court. The same is buttressed by the appellant's statement in defence that when she took the jacket to the deceased in the club, the deceased bought her RedBull which is a non-alcoholic drink. Further, there was no evidence to show that she got intoxicated from drinking Redbull. And even if she may have taken alcohol, and was indeed intoxicated, it was not shown that she did so involuntarily or that she did not either know what she was doing or what she was doing was wrong when she attacked the deceased. Clearly, her conduct as summarized by the learned trial Judge is a testament of a person who was in control of her mind and she pre-meditated to either cause grievous harm or death of the deceased. We reject the appellant's defence of intoxication. We have

no reason to depart from the reasoning of the trial court that she possessed malice aforethought when she caused the death of the deceased.

26. Similarly, we also conclude that the defence of self-defence is not available to the appellant. This court set down the principles to be applied if an accused person is to rely on the defence of self- defence in the case of *Victor Nthiga Kiruthu & another v R [2017] eKLR* thus:

> ' (i) Self-defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one's family or ones property from a real or threatened attack. Self-defence is therefore a justification in the application of force recognized by the common law.
>
> ii. The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self-defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.
>
> ii. It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self-defence. It is sufficient if he apprehends an attack and uses force to prevent it.
>
> ii. The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.
>
> ii. What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case.

27. The fact that the appellant willingly walked into the house and took a knife, which is obviously a dangerous weapon and proceeded to viciously stab the deceased twice on the chest, negates any self-defence on her part. Even assuming that she was reacting to the cut wound inflicted on her face, it is evident that the force she used was excessive and disproportionate to that used by the deceased. She had the knowledge that reacting in the manner she did would cause grievous harm or death to the deceased, which was indicative of malice aforethought on her part.

28. Accordingly, we find that the prosecution proved the offence of murder against the appellant beyond any reasonable doubt, hence, her conviction was sound and we uphold it.

29. Was the death sentence excessive in the circumstances? The decision of the trial court predates the Supreme Court's decision in Francis Karioko Muruatetu & Another vs Republic [2017] eKLR. In that case, the Supreme Court held that the mandatory nature of the death sentence is unconstitutional, as it does not allow the consideration of the mitigating factors put forth by the accused in order to determine an appropriate sentence, which includes the death penalty where the circumstances so require. We therefore find that this is an appropriate case for this court to intervene and interfere with the death sentence imposed on the appellant by the trial court.

30. Before the trial court, the appellant pleaded for leniency stating that she regretted the death of the deceased. She also stated that she had made up with the mother of the deceased who was even ready to take care of their three-year old child. Further that, while in prison she had learnt life support skills which she would help her engage in income generating activities and be a law-abiding citizen once she left the prison. In addition to this mitigation, we have considered that the deceased met his death from a misunderstanding between a husband and wife, with marital differences being a normal occurrence.

We therefore find that this is an appropriate case for this Court to intervene with the death sentence imposed on the appellant by the trial court.

31. Consequently, this appeal partially succeeds. The appellant's appeal against conviction is dismissed. The appeal against sentence succeeds only to the extent that the death sentence imposed by the High Court is set aside and substituted with twenty (20) years imprisonment with effect from the date of arrest which is July 27, 2014.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR