



REPUBLIC OF KENYA



**Gathoga v Republic (Criminal Appeal 15 of 2021)
[2023] KECA 248 (KLR) (3 March 2023) (Judgment)**

Neutral citation: [2023] KECA 248 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 15 OF 2021
MSA MAKHANDIA, GWN MACHARIA & WK KORIR, JJA
MARCH 3, 2023**

BETWEEN

GEORGE GICHEHA GATHOGA APPELLANT

AND

REPUBLIC RESPONDENT

*((Being an appeal from the Judgment of the High Court of Kenya at Nairobi
(Wakiaga, J.) dated 10th May, 2017) in Nairobi HCCR.A No. 114 of 2014)*

JUDGMENT

1. This appeal emanates from the judgment of the High Court at Nairobi delivered on May 10, 2017 by Wakiaga, J in Criminal Case No 114 of 2014. The appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars were that on November 30, 2014 at Kiawanda Village, Thigio Location in Limuru Sub-County within Kiambu County, the appellant murdered, Salome Wambui Kariuki. The appellant denied the information, was tried, convicted and sentenced to death.
2. During trial, the prosecution called a total of eleven witnesses, PW1, Esther Njeri Kirie, the appellant's wife, testified that she was at home with the appellant on November 30, 2014. Their child had been unwell the previous night and so they took him to Tigoni Hospital but on arrival they were told the child was already dead. They reported the death at Tigoni Police Station and went back home with the body of the child as they intended to bury him the following day. Her father-in-law came to give his condolences, followed by Salome Wambui Kariuki, "the deceased" who was the appellant's aunt. The appellant accused the deceased of bewitching the child, took a panga and cut her on the head and hand. He was thereafter disarmed by his brother, Shadrack Kimani (PW3)
3. PW2, Wilfred Gathoga Kimani, the appellant's father stated that on the material day, he was at home when he was informed that the appellant's child had died. He went over to condole him and on his



way back met with the deceased who was also going to pay her respects. After a few minutes, he heard the deceased scream that she had been cut on the head by the appellant. He went back and found the appellant already disarmed and locked in the house. The area Chief was thereafter called who in turn contacted police officers from Tigoni Police Station, who came and took the body of the deceased to the mortuary.

4. PW3, was at home when he heard noise and rushed to see what was happening. He found the deceased on the ground while the appellant was holding a panga. He disarmed him and locked him in the house. PW4, Peter Kariuki Kimani, was at work on the material day when he received information that his wife had been killed by the appellant. When he arrived at the scene he saw the body of the deceased which had been cut severally. PW5, CLP Thomas K. Langat of Tigoni Administration Police Post, received a call informing him that a person had been killed. He proceeded to the scene and found the deceased's body, which had a deep cut on her head, neck, left and right hand, with the left wrist chopped off. The appellant had been locked inside the house, whom he arrested, and took possession of the panga. He later took the appellant to the Police Post.
5. PW6, AP Dunson Kagiri, accompanied PW5 to the scene of crime. He gave similar evidence as PW5. PW7, Erick Ngugi Gitau, the area chief, was informed that the appellant had fatally cut the deceased. He called PW5, proceeded to the scene where he found the appellant had already been arrested and they took him to the AP's camp. PW8, Frank Anunda, a scene of crime officer took photographs of the scene, which he produced in court as exhibits. PW9, Dr. Ndegwa Peter Muriuki, a pathologist performed the post mortem on the body of the deceased, and came to the conclusion that the cause of death was exsanguination excessive hemorrhage due to cut wound caused by sharp trauma.
6. PW10, Lawrence Kinyua Muthuri, an analyst at Government Chemist Laboratory received 5 items from PC Flex Oguna and PC Onyango being a purple woolen hat for the deceased, a grey shirt belonging to the appellant, a panga and 2 blood samples belonging to both the deceased and appellant. He was requested to examine the items and upon examination he found that the woolen hat, the shirt and panga were stained with human blood belonging to the deceased. PW11, CPL Felix Kigun whilst at Tigoni Police Station, received a report from the OCS of a murder and proceeded to the scene. On arrival, he found the deceased lying in a pool of blood. He secured the scene and called the scene of crime officers. The body had multiple injuries on the head, neck and both hands with the right hand having been completely chopped off.
7. The trial court placed the appellant on his defence and he gave sworn testimony. He testified that on the material day, his child was feeling unwell and took him to Tigoni District Hospital where the child was pronounced dead on arrival. From there, he found himself at the Police Station and did not remember what had happened.
8. The trial court found that from the totality of the evidence presented, the appellant had attacked the deceased with malice aforethought and that the respondent had proved its case against the appellant beyond reasonable doubt. The trial court therefore found him guilty, convicted and sentenced him to suffer death.
9. Being dissatisfied with the said judgment, the appellant preferred this appeal citing seven grounds. That the trial court erred in law and fact in: failing to find that no *mens-rea* or *actus reas* was proved against the appellant; convicting the appellant on circumstantial evidence that did not meet the threshold; shifting the onus of prove from the prosecution to the appellant; misapprehending the facts, applying wrong legal principles and drew erroneous conclusions to the prejudice of the appellant; to take into account the appellant's insanity defence and failing to find that the constitutional rights of the



appellant under Articles 25(c), 49(1)(f) (i) (ii), 50(2)(b)(f) had been violated; and, finally, the appellant complained that the sentence imposed was harsh and excessive.

10. The appellant in his submissions stated that the trial court misdirected itself in convicting the appellant purely on circumstantial evidence while ignoring the principles governing circumstantial evidence as no one saw the appellant attack the deceased. He was thus convicted on suspicion, and suspicion alone, however strong, could not have been the basis of a conviction. He cited the case of *John Gacoki Ngilu v Republic*, Criminal Appeal No 136 of 2016, for this proposition. The appellant submitted that the exhibits tendered in court did not directly link him to the death of the deceased. It was submitted that the prosecution had not proved its case beyond reasonable doubt as malice aforethought on the part of the appellant was not established.
11. Citing the case of *Republic v Silas Magongo Onzere alias Fredrick Namema* [2017] eKLR, the appellant submitted that the burden of proof of an accused guilt, rests solely on the prosecution throughout the trial save where there are admissions by the accused person. That the prosecution did not discharge this burden. Lastly, the appellant relied on the case of *Republic v Savi Musingila* [2018] eKLR for the proposition that, the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution's case raising material doubts must be resolved in favour of the accused. On sentence, the appellant submitted that it was harsh and excessive, given the Supreme Court decision in *Francis Karioko Muruatetu & Anor v Republic* [2017] eKLR. The appellant submitted that should we be inclined to dismiss the appeal on conviction, we should at least review the sentence.
12. The respondent in opposing the appeal, submitted that the circumstances under which the deceased died pointed irresistibly to the appellant as being the perpetrator of the crime to the exclusion of any other person. PW2, the appellant's father, left him talking to the deceased outside his house. He soon thereafter heard screams and on going back, found the deceased having been cut on the head with a panga. It took the efforts of PW3 to disarm and calm down the appellant. The death of the deceased was thus a direct consequence of an unlawful act by the appellant. That the manner in which the deceased was attacked and the nature of injuries inflicted, point to an intention to either cause the death of the deceased or to cause grievous harm. The appellant was armed with a panga and the postmortem report produced by PW9 showed that the deceased's head was decapitated. The deceased died in the appellant's compound and there was no proof that he suffered from a disease of the mind at the time of commission of the offence. The burden of proving insanity rested on the appellant which he did not discharge. The trial court in convicting the appellant observed that the ferocity of the attack on the deceased reflected a vengeful mood. It was submitted that given the foregoing, the sentence imposed was well deserved. We were therefore urged not to interfere with the conviction and sentence since the entire appeal lacked merit.
13. This is a first appeal. Our duty as set out in rule 29(1) of this Court's *Rules* is to re-appraise the evidence tendered before the trial court and draw inferences of fact on the guilt or otherwise of the appellant. The appellant is entitled to have our own consideration and view of the evidence as a whole and our own conclusions thereon. However, in doing so we must bear in mind that we did not have the benefit of observing the demeanour of the witnesses. In the case of *Issac Ng'ang'a alias Peter Ng'ang'a Kabiga v Republic* Criminal Appeal No 272 of 2005 this court held that:

“In the same way, a court hearing a first appeal (i.e. a first appellate court) also has 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 of the same.”

14. We have considered the above mandate in the light of the rival positions herein. The issues that fall for our determination are whether: elements of the offence of murder were proved, the conviction was based on circumstantial evidence and whether it met the threshold; and lastly, whether the appellant’s defence of insanity was considered.
15. To sustain an information of murder, the prosecution must prove beyond reasonable doubt, the fact and cause of death of the deceased person; that the death of the deceased was as a result of an unlawful act or omission on the part of the accused person; and that such unlawful act or omission was committed with malice aforethought. The death of the deceased is not disputed. From the evidence of PW1, PW2, PW3, PW4, PW7 and PW9, they all confirmed the death of the deceased and its cause. The said witnesses in unison found the deceased already fatally injured with head and hands injuries, which injuries according to PW9 were the cause of the death of the deceased being exsanguination due to multiple cut wounds due to sharp force trauma.
16. From the evidence on record, the appellant was linked to the injuries by PW1 whose testimony was direct. She testified that as the deceased came to their compound, the appellant who was outside the house went into the house and took a panga and by the time she followed him outside, he had already cut the deceased. This evidence was further corroborated by PW2 and PW3 whose evidence was to the effect that they found the deceased lying down, with the appellant armed with a panga.
17. The appellant has submitted that no one saw him cause the death of the deceased and that it was circumstantial evidence which was invoked to find him guilty, but which the trial court did not evaluate according to the set principles. The principles applicable in cases turning solely or substantially on circumstantial evidence have been set out in a number of cases for instance, the case of *Rex v Kipkerring Arap Koske & 2 Others* [1949] EACA 135 this Court held that:

“In order to justify a conviction on circumstantial evidence the inference of guilt, the 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 burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

18. Further, this Court in *Simoni Musoke v R* [1958] EA 71 also added that before drawing the inference of the accused’s guilt from circumstantial evidence, the court must be sure that there are no co-existing circumstances or factors which would weaken or destroy that inference. In *Abanga alias Onyango v Republic* Cr. App No 32 of 1990 (UR) this Court emphasized that in such cases,

“the circumstances taken cumulatively, should form a 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.”

The process entails subjecting each link in the chain to close and separate examination before the whole chain is put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge as was held in the case of *Mwangi & Another v Republic* [2004] 2 KLR



19. The pieces of the circumstantial evidence relied on are that PW2 met the deceased on her way to condole the appellant over the death of his child. Soon he heard screams and when he went back he found the appellant standing over the deceased with a panga in hand. The deceased had been cut severally. According PW1, when the deceased came to condole them, the appellant accused her of bewitching their child, went into the house, came out with a panga and cut the deceased severally. As for PW3, when he rushed to the scene he found the appellant right outside his door with the deceased on the ground having sustained injuries inflicted by a panga that the appellant was still holding. In fact, it was him who disarmed the appellant.
20. There was no evidence that there was any other person in that home other than the appellant, PW1 and the deceased. Indeed, the appellant was found by PW2 and PW3 still holding the panga with which he had fatally attacked the deceased. Further, when the blood samples found on the panga and the appellant's shirt were subjected to analysis, they were found to belong to the deceased. The assertion by the appellant that the circumstantial evidence relied on did not meet the threshold or that he was convicted on mere suspicion cannot stand scrutiny in the face of the foregoing. Besides circumstantial evidence, there is also the direct evidence of PW1 which the trial court took into consideration and rightly so in our view. It is therefore clear that the appellant was properly placed at the scene of crime and he is the person who committed the offence. We agree with the finding of the trial court that the injuries sustained by the deceased and which caused her death, were attributable to the appellant and no other person.
21. The next baseline of the information was whether malice aforethought was proved to the required standard as defined in section 206 of the *Penal Code*. The prosecution had a duty to prove malice aforethought on any of the circumstances set out in the aforesaid section which defines malice aforethought as follows:

- “ 206. 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.

From the foregoing, malice aforethought can be either direct or indirect depending on the facts of each case.

22. In the classic case of *Republic v Tubere s/o Ochen* [1945] 12 EACA 63, the court held that an inference of malice aforethought can be established by considering the nature of the weapon used in causing death, the number of injuries inflicted upon the victim, the part of the body where such injury was



inflicted, the manner in which the weapon was used, and the conduct of the accused before, during and after the attack.

23. From the record, the appellant was found with a panga which as we have already stated was used to cause injuries to the deceased. The injuries as confirmed by PW9, were deep cut wound at the back of the neck reaching the spinal column, head decapitated, two incisive wounds left frontal face, left hand amputated above the wrist joint, deep incisive wound right and deep hand (palmer aspect) cut left elbow area. With these sort of injuries, can there be any doubt as to the appellant's intent in terms of malice aforethought? The motive for the appellant's attack was that he suspected the deceased to have bewitched his child. Although motive is not a consideration in criminal offences it is nonetheless a pointer to the circumstances of the offence as in this case. Given the foregoing, it cannot be said that malice aforethought was not proved.
24. To counter this, a defence of insanity was advanced. It was raised at the close of the defence case by the appellant's advocate, Mr. Wamwayi, who stated that the appellant had no recollection of what had happened on the material day. It was submitted that PW2 had told the court that the appellant had suffered cerebral malaria at some stage and had been treated but he could not understand why the appellant acted like he did. It was therefore submitted that the appellant had not planned to attack the deceased and only reacted spontaneously as a result of losing his mind, hence temporary insanity.
25. The critical point at which the mental state of the accused person is relevant for purposes of the defence of insanity, is at the time of the commission of the act complained of. If the appellant was suffering from a disease which affected his mind and made him incapable of understanding, what he was doing or knowing that what he was doing was wrong, then he is not responsible for his actions. In such circumstances, the appellant would not be entitled to an acquittal but under section 167(1)(b) of the *Criminal Procedure Code*, he would be convicted and ordered to be detained at the President's pleasure because insanity is a mental illness requiring treatment rather than punishment.
26. The only evidence that was tendered before the trial court was that of PW2 who testified that when the appellant was locked in his house having been disarmed, he kept crying about his child saying that he had been killed. That this made him conclude that the appellant was not of sound mind and that previously when the appellant was in class eight he had suffered from typhoid and cerebral malaria and was taken to Mathare Mental Hospital and treated. There was no documentary evidence presented by the appellant to corroborate this line of defence. The only document availed was the report by Dr. Wamukhoma, Consultant psychiatrist dated March 30, 2015 in which he held that the appellant was of sound mind. The trial court whilst addressing the issue stated thus:

“From the evidence tendered, it is clear that the accused person was in total control of his mind, he knew that his child was dead and was therefore at the time conscious of the nature of his act, the accused did not attack the deceased spontaneously, having spoken with her and accused her of having bewitched his child, the accused went into his house where he took the murder weapon and the ferocity of the attack to my mind reflect the vengeful mood of the accused and the anger against the deceased whom he believed had bewitched his child and would therefore dismiss the accused defence herein.”

27. The essence of the defence of insanity was captured in the famous English *McNaughten* Rules following *Mc Naughten* case, 1843 – 10 C & F 200 thus: -

“...insanity is a defence if at the time of the commission of the act, the accused person was labouring under such defect of reason, from a disease of the mind, as not to know the nature



and quality of the act he was doing; or if he did know it, he did not know that what he was doing was wrong.” Further, section 9(1) of the Penal Code provides that:

“Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.”

It is clear that the burden of proving insanity rests on the accused. In the case of Muswi s/o Musela v R [1956] EACA 622 the court stated that evidence of the state of mind of the accused should be called by the defence.

28. In the instant appeal, it is clear from the record that the appellant killed the deceased. Further, from the witnesses, he was also aware of what he was doing. In fact, he spoke with the deceased accusing her of witchcraft, before he entered the house and came out with a panga and attacked her. Without any tangible evidence to the contrary, the trial court cannot be faulted for finding that the appellant was of sound mind when he committed the offence. In agreeing with the trial court, we advert to the case of Leonard Mwangemi Munyasia (*supra*), where this Court held that:

“We are of the view that a court cannot, as the trial Judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person.”

29. In the end, we are convinced that the prosecution did discharge its duty of proving the information against the appellant beyond reasonable doubt and we are in agreement with the finding of the trial judge on the same. When handing down the sentence, the learned Judge noted:

“On the community attitude toward the accused, it was stated that the mother and the father of the accused indicated that they did not want to hear anything to do with the accused who was not welcome back to their home. The community described the accused as a nuisance who occasionally stole from them and should therefore be kept away.....In this case the accused without any provocation on the part of the deceased descended upon her with a panga allegedly without any founded reason on the belief that she had bewitched his child. Having taken into account the society attitude against the accused I am of the considered view and hold that the circumstances of this case call for social retribution.....I hereby sentence the accused to suffer death as provided for in law.”

30. It follows that the appellant was sentenced to death because there was no discretion which the court had in the matter. But following the decision by the Supreme Court, in the Francis Karioko Muruatetu & another v Republic [*supra*] the discretion of the trial court in murder trials to impose any other sentence than death has been restored. Given the circumstances of this case, we are inclined to interfere with the sentence.
31. We have taken into account the period which the appellant had spent in custody, which is 8 years. We are satisfied that the appropriate sentence, which we hereby impose, to be 20 years’ imprisonment from the date of arrest, which is November 30, 2014, as there is no evidence that during the trial, he was out on bond.



32. Accordingly, the appeal on conviction is dismissed. However, the appeal on sentence succeeds to the extent that the death sentence is set aside, and substituted with a sentence of 20 years' imprisonment.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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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

