Nzioki & another v Republic (Criminal Appeal 19 of 2021)
[2023] KECA 245 (KLR) (3 March 2023) (Judgment)

Neutral citation: [2023] KECA 245 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 19 OF 2021

MSA MAKHANDIA, GWN MACHARIA & WK KORIR, JJA

MARCH 3, 2023

BETWEEN

MUSEMBI NZIOKI ..... 1ST APPELLANT

FESTUS MUTUA NZIOKI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kitui (L.N. Mutende, J.) delivered and dated 13th November, 2018 in HC Criminal Case No. 40 of 2015)

JUDGMENT

1. Musembi Nzioki and Festus Mutua Nzioki, the 1st and 2nd appellants respectively, were charged with the offence of murder contrary to Section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that the appellants murdered one Shadrack Kasee Nzioki on June 21, 2014 at Matithini village, Kyanika location in Nzambani District within Kitui County. The appellants denied the information and the case proceeded to full hearing after which the appellants were found guilty, convicted and each sentenced to serve 25 years in prison.

2. Being aggrieved with the judgment and sentence of the trial court the appellants are now before us on appeal and fault the trial court for convicting them even though malice aforethought was not established. They also assert that they were convicted based on hearsay evidence; that no independent eyewitnesses were called to testify; that their conviction was based on contradictory evidence of the prosecution witnesses; and, that their mitigation was not considered prior to their being sentenced to jail for 25 years.

3. This is a first appeal, and, as a first appellate court, we are under the obligation to delve into and consider the evidence as presented before the trial court. In that regard we are obliged to analyse the evidence, and evaluate it in light of the applicable legal, statutory and constitutional standards and principles

prior to reaching our independent decision. Even as we do that, we must bear in mind that it is the court from which the appeal originates that heard the witnesses and observed their demeanour. This statement of the law has continuously been emphasised by this court in its judgments. For that matter, we only need to cite the decision in *Dickson Mwangi Munene & another vs. Republic* [2014] eKLR where it was stated that:

> "This being a first appeal, this Court is obliged to re-evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge's finding of fact unless it is supported by the evidence on record."

4. At the trial, the prosecution's case was that on the night of June 21, 2014, Elijah Kitemi Soi (PW1) was asleep in his house with his wife Josephine Jane Kiteme (PW3) when they were alerted that Shadrack Kasee Nzioki (hereinafter referred to as "the deceased") was being assaulted at the AIC church. They went to the scene and found the deceased being assaulted with sticks by the appellants. Shortly, someone by the name Joshua Mwaniki emerged with a panga and cut the deceased on the neck. The deceased fell down. PW1 and PW3 left the affairs in that state and went back to their house to sleep. Thirty minutes later, one Nzioki Musembi woke them up again informing them that police officers wanted to talk to PW1. PW1 went back to the scene alone and explained to the police officers that the deceased who was his brother was of unsound mind. The deceased was then taken to hospital and later succumbed to the injuries at Kenyatta National Hospital. PW1 and PW3 were firm that they identified the appellants who were their relatives as they assaulted the deceased using security lights that were at the church.

5. In their defence, the appellants denied participating in the assault of the deceased.

   The 1st appellant stated that on the material night he was asleep in his house and he never heard anything as he was drunk. In the morning as he was passing by the church on his way to school where he worked as a teacher, he met some ladies who asked him whether he was aware that the deceased who was his nephew had been assaulted and arrested for attempting to steal from a church. He never believed them as he was aware that the deceased was in Garissa. A few days later two police officers went and informed him that his nephew had been admitted at Kitui Referral Hospital. He called his sister Mary Marura Nzioka (PW4) who asked him to go and check on the deceased but when he arrived at Kitui Referral Hospital he was informed that the deceased had been referred to Kenyatta National Hospital. PW4 was the mother of the deceased. According to the 1st appellant, after 4 days he learned that the deceased had died. He thereafter identified the body of the deceased to the pathologist for post-mortem purposes. The 1st appellant testified that he was arrested 8 months later and charged with murder after PW1 forwarded his name to the police.

6. On his part, the 2nd appellant testified that on the material day at about midnight, he went to the church and found the deceased who was already injured having been made to sit down. He asked him when he had returned from Garissa but the deceased did not give him an answer. The police came and took the deceased away at about 2.00am.

7. In its judgment, the trial court found that the evidence on record established all the elements of the offence of murder. Essentially, the appellants were found guilty based on the application of the doctrine of common intention under section 21 of the *Penal Code*. The court also found that the identity of the appellants was proved and that malice aforethought was established by the circumstances of the case.

8. When the appeal came up for hearing on November 15, 2022, the parties opted to rely on their written submissions. Marygoretti Cherutto Chepseba (Mrs), learned counsel for the appellants, on the issue of malice aforethought, stressed the importance of establishing this element in order for the accused person to be convicted for the offence of murder. Counsel held the view that the evidence on record did not establish malice aforethought on the part of the appellants. She therefore urged the court to be guided by the decision of this court in *Peter King'ori & 2 others vs. Republic* [2014] eKLR to find that malice aforethought as defined under section 206 of the *Penal Code* was not proved.

9. On the claim that the appellant's conviction was based on hearsay evidence, counsel submitted that the evidence of PW1 could not be relied upon since he did not witness the incident from the beginning and that when he arrived at the scene, he found the deceased having been beaten. To counsel, one Mustapha Abel who was mentioned as an eyewitness ought to have been called as a witness instead.

   Counsel also submitted that the burden of proof was upon the prosecution and that burden ought not to have been shifted to the appellants. To buttress this point, counsel relied on the English cases of *Woolmington vs. DPP* (1935) UKHL and *R. vs. Ward*, (1993) 1 WLR 619, as well as this court's decisions in *Ndegwa vs. Republic* [1985] eKLR, and the Indian Supreme Court decision in *Anbazhagan vs. State of Karnataka & 2 others,* CR Appeal No. 637 of 2015, among others.

10. Counsel also submitted that Mustapha Abel was a key witness and the failure to call him diminished the credibility of the prosecution's case against the appellants. Counsel held the view that the members of the management of the AIC church which the deceased attempted to break into ought to have been called as witnesses to shed more light on the incident. It was also submitted that the evidence of PW5 Dr Andrew Kanyi Gachie contradicted that of PW1 and PW3 as to the injuries sustained by the deceased. In her view, such contradictions went to the root of the prosecution case and ought to have been resolved in favour of the appellants. Finally, on sentence, counsel submitted that the sentence was passed without considering the appellant's mitigation and therefore this court ought to interfere with it. In summary, counsel urged us to find that this appeal is merited and allow it.

11. For the respondent, Ms Ngaliuka submitted that there was sufficient evidence to prove all the ingredients of the offence of murder against the appellants. Counsel submitted that the fact of and the cause of the deceased's death was established by the postmortem report and the evidence of PW5. Counsel further submitted that the evidence of PW1 and PW3 confirmed that the appellants were complicit in the murder of the deceased. Counsel also urged that the appellants were known to PW1 and PW3 and therefore in the circumstances there was no risk of mistaken identity.

12. On malice aforethought, counsel submitted that the appellants were aware of the consequences of their actions and therefore they had malice aforethought. To buttress this point, counsel referred the court to the case of *Ali Salim Bahan & another vs. Republic* [2019] eKLR. Counsel also invoked section 21 of the *Penal Code* to submit that even if the deceased was attacked by a mob, the appellants were still culpable since they took part in the assault and therefore had a common intention to cause grievous harm to the deceased or murder him.

13. Counsel rejected the appellant's argument that failure to call certain witnesses negatively affected the prosecution's case stating that no adverse inference could be made in the circumstances as the witnesses who testified established that the appellants committed the offence. Counsel added that any contradictions that existed were minor and did not go into the substance of the case.

14. On the issue of the sentence imposed on the appellants, counsel submitted that the sentence passed was life imprisonment instead of the death sentence and should therefore not be disturbed. Counsel therefore urged us to dismiss the appeal in totality.

15. Having reviewed the evidence on record, the record of appeal, the submissions and authorities by both parties, it is our view that this appeal raises two issues for our determination, namely, whether the appellants were guilty of the offence as charged and second, whether the sentence passed by the trial court was proper.

16. It is not in dispute that the deceased died on June 26, 2014. The body of the deceased had multiple bruises on the face, both upper and lower limbs and left hypochondriac region. The cause of death was head injury due to blunt force trauma. That evidence is found in the testimony of PW5 and the post-mortem report which he produced as an exhibit.

17. The next issue for our determination is whether it is the appellants' actions that led to the death of the deceased. On the identity of the appellants, the trial court at paragraphs 11 and 15 of the judgment ruled as follows:

> "11. The incident happened at night, PW2 stated that when they arrived at the scene people dispersed. Only PW1 volunteered the information that they got. DW2 stated that he was at the scene but he did not engage the police. The intensity of security lights that were at the church that aided witnesses in seeing was not given....
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> 15. The Accused herein are blood relatives of PW1 and PW3 who were aided by security lights from the church to see. They were well known to them such that they could not be mistaken to their identity (sic). The 2nd Accused admitted having been present but denied having committed the act that resulted into the death of the Deceased. However, PW1 and PW3 were categorical that they participated in assaulting the Deceased whom they accused of theft."

18. From the evidence of PW1 and PW3, the incident took place at night. PW1, PW2 and PW3 also testified that there was a large crowd at the scene when they arrived. PW1 and PW3 testified that they relied on the available security lights to see the people who were assaulting the deceased. PW1 also testified that he spoke to the 1st appellant at the scene. PW2 testified that his decision to arrest and charge the appellants was informed by the statements of PW1 and PW3. From this chain of evidence, two things are clear, namely, this was a case of recognition as the appellants are uncles to PW1 and PW3 and were known to them prior; and that this recognition was at night.

19. What then are the rules of engagement when faced with such a scenario? This court in *Anjononi & 2 others vs. Republic* [1980] eKLR noted the difference between identification and recognition stating thus:

> "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. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported)."

20. Again, in *Maitanyi vs. Republic* [1986] eKLR, this court addressed the issue of identification at night as follows:

> "It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification

would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into."

21. In applying the principles enunciated in the cited cases above, we are satisfied that the learned Judge rightly noted that there was no evidence as to the intensity of the security lights. We note that the absence of the evidence to establish the intensity of the security lights and their position in relation to the appellants and the deceased are material to this case. Without clear evidence on record as to the brightness or otherwise of the lights, the trial court ought to have been cautious as to whether the appellants were indeed positively identified. Our view that the deficiency in the evidence with regard to the intensity and the positioning of the lights vitiated the evidence on identification is further cemented by the discrepancy between the evidence of PW1 and PW3 who said that the deceased was cut on the nape of the neck with a panga by one Joshua Mwaniki with that of PW5 who was categorical that he did not encounter such an injury on the deceased when he conducted the post-mortem. Such a discrepancy would ordinarily be regarded as inconsequential as did the trial court. However, in this case, it is vital as the two eye-witnesses who allege to have seen the appellants assault the deceased with the help of the existing light were not able to have a clear vision of what Joshua Mwaniki did to the deceased. If the actions of one Joshua Mwaniki were at the same place that the appellants were holding and assaulting the deceased, and the same source of light was used by PW1 and PW3, then the discrepancy herein is vital.

22. In our view, the import of such a discrepancy serves to establish a doubt in the mind of this Court as to the favourability of the circumstances of recognition. It is possible that the appellants were placed at the scene of crime, however, it is not clear whether it is their actions that led to the injuries to the deceased. We cannot satisfactorily agree that the evidence of the eyewitnesses, PW1 and PW3, was free from possibility of error.

23. Another question is the level of participation of the appellants at the scene. The evidence of PW1 and PW3 is that when they arrived at the scene, the deceased had been beaten. Although PW3 claimed that it was only the appellants who were at the scene when she arrived with PW1, there is evidence from PW1 and Corporal Julius Kibet Rono (PW2) that there was a mob at the scene. The arrival of PW1 and PW2 at the scene was invoked by one Naomi Musembi who, from the record, appeared to have known of the incident and when it started. PW1 and PW3 were categorical that Naomi Musembi did not tell them when or who started assaulting the appellant. PW1, however, testified that the 1st appellant informed him that the deceased had been caught trying to break into a church by one Mustapha Abel.

24. From this evidence, it is not clear what the roles of the appellants were in relation to the cause of the death of the deceased. Even though PW1 and PW3 testified as having seen the appellants assaulting the deceased, it still remains doubtful as to what weapons they used, whether they actually assaulted the deceased and which parts of the deceased's body they concentrated their assault on. The deceased's body had injuries on the lower limbs as well as on the head. There is evidence that one Joshua Mwaniki assaulted the deceased near his head that is as per the evidence of PW1 and PW3.

25. PW2 on his part testified that he found a crowd at the scene. When he arrived, the crowd dispersed. He only managed to speak to PW1 at the scene. PW2 being the investigating officer did not offer any further description of the scene or why he did not attempt to trace the items used in assaulting

the deceased or even why he did not seek information from the many other witnesses mentioned by PW1. This would have shed more light on what transpired as well as the role of the appellants in the whole situation. We therefore find that this is classic case where more witnesses ought to have been called to shed light on what transpired. The persons named by the witnesses as having been at the scene were Mustapha Abel, Joshua Mwaniki, Naomi Musembi, Muinde Mutua, and Nzioki Musembi. Muinde Mutua was a village elder whereas Nzioki Musembi was related to the deceased. No explanation was given as to why these crucial eyewitnesses were not called to testify. It can be inferred that their testimony would have painted a different picture on how the deceased met his death.

26. In the circumstances, we find that the evidence on record fails to clearly point to specific actions of the appellants as the cause of the deceased's injuries leading to his death. The finding of the trial court that the evidence on record reveals clearly that the appellants were responsible for the assault on the deceased is therefore untenable.

27. The next element of the offence of murder is the need to prove malice aforethought on the part of the accused person. In *Nzuki vs. Republic* [1993] eKLR, the Court had the following to say with regard to malice aforethought:

> " 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.
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> In an appeal such as the present one, any one of the intentions set out above is a necessary constituent of the offence of murder contrary to section 204 of the Penal Code and the burden of proving any such intention is throughout on the prosecution. No doubt, if the prosecution prove an act the natural consequence of which should be a certain result and no evidence or explanation is given, then the Court may, on a proper direction, find that the accused is guilty of doing the act with the necessary intent, but if on the totality of evidence there is room for more than one view as to the intent of the accused, the Court should direct itself that it is for the prosecution to prove the necessary intent to its satisfaction, and if, on a review of the whole evidence, it either thinks that that intent did not exist or it is left in doubt in respect thereof, the accused should be given the benefit of that doubt. Thus, where on a charge of murder the evidence does not exclude the reasonable possibility that an accused person killed the deceased by an unlawful act but without the intent necessary to constitute legal malice requisite to the proof of that offence, that killing would only amount to manslaughter. See Rex v Steane, [1947] 1 KB 997; and Sharmpal Singh s/o Pritam Singh v R [1960] EA 762."

28. We have extensively conducted an analysis of the evidence surrounding the scene of crime. With regard to malice aforethought, the trial court at paragraphs 23-26 found as follows:

> " 23. In his defence the 1st Accused stated that the last time he had seen the Deceased was when he facilitated him to travel to Garissa. That no bad blood existed between them. PW1 on the other hand explained that previously the Deceased had stolen the 1st Accused's utensils and chicken an act that caused them to beat him up and hand him over to the police. On the material date they accused the Deceased of theft and pretence as they assaulted him.
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> 24. Therefore at the point of assaulting him they were fully aware that their conduct may have resulted into grievous harm.

25. It was argued by the 1st Accused that he escorted PW4, Mary Nzioki the mother of the Deceased to the mortuary when she went to identify the body of the Deceased. That a person who has participated in the murder of the person could not have done so. Looking at the conduct of both Accused persons, they were not concerned after the Deceased was injured. They made no effort of even finding out what happened to him after the police took him away until his mother asked the 1st Accused to try and find out his condition.

26. Evidence adduced proves beyond reasonable doubt that both the Accused had at least the intention to cause the Deceased grievous harm. In the premises they acted with malice aforethought. The case against them is therefore proved to the required standard."

29. In our own independent evaluation and assessment of the record, we are of a different opinion from that reached by the trial court for three major reasons. First, our analysis of the evidence of PW1 and PW3 reveals that the same cannot be conclusive on the role of the appellants in as far as the assault on the deceased is concerned. This being the case, we cannot find that the alleged theft of the 1st appellant's utensils and chicken by the deceased, as was stated by PW1, was reason enough for the 1st appellant to assault the deceased. The deceased herein was allegedly caught trying to break into a church which was not owned by the appellants.

30. Second, based on our analysis of the evidence on record, we cannot authoritatively find that the appellants were responsible for the assault of the deceased. With such doubts in mind, it would be a long shot to invoke the provisions of Section 206(b) of the Penal Code to imply malice aforethought based on actions which we are in doubt of.

31. Third, unlike the trial court, we cannot find that the conduct of the appellants after the assault of the deceased amounts to malice aforethought. The evidence of the 1st appellant which was subject to scrutiny in cross-examination was that upon being informed of the assault, he called the deceased's mother and notified her about the incident. He then proceeded to look for the deceased at Kitui District Hospital where he was informed that he had been transferred to Kenyatta National Hospital. The 1st appellant even escorted the deceased's mother during the post-mortem on the body of the deceased. His arrest was made about 8 months later. No explanation was offered in regard to the delay in arresting the 1st appellant.

32. Consequently, it is our finding that the evidence on the conduct of the appellants does not prove malice aforethought. The same fate befalls the other available evidence on the actions of the appellants. Further, even though it would be plausible to infer malice from the nature and position of injuries inflicted, we are not convinced that the evidence on record points to the appellants as the persons who inflicted the said injuries on the deceased. It is indeed highly likely that the deceased died of injuries inflicted on him by a mob. However, no convincing evidence was placed before the trial court by the prosecution to show that the appellants were part of the mob or they acted in concert with those who killed the deceased.

33. In the circumstances and based on our reasons above, we find that the evidence tendered by the prosecution in this case fell short of establishing the offence of murder against the appellants. The uncertainty swirling around the evidence on record creates doubt in our minds. The appellants are bound to benefit from such doubts in that their innocence should be upheld.

34. The upshot is that this appeal succeeds. Consequently, the conviction against the appellants is hereby quashed and the sentence set aside. The appellants are therefore set at liberty forthwith unless otherwise lawfully held.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR