Mohamed v Republic (Criminal Appeal 70 of 2020)
[2023] KECA 595 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 595 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 70 OF 2020

MSA MAKHANDIA, S OLE KANTAI & GWN MACHARIA, JJA

MAY 26, 2023

BETWEEN

ABDULLAHI NOOR MOHAMED ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the judgment of the High Court at Nairobi (Lesiit, J.) delivered on 21st September 2016 in Criminal Case No. 90 of 2013.)

JUDGMENT

1. The Appellant, Abdullahi Noor Mohamed was charged and convicted of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the charge were that: - on June 24, 2013 along Jam Street Eastleigh estate in Kamukunji District within Nairobi County murdered Abdulahi Nor Mohammed Alis Arab.

2. We are minded that this is a first appellate court and we are required to subject the evidence before the trial court to fresh and exhaustive examination, weigh it and draw our own conclusions bearing in mind that the trial court had the advantage, which we do not, of hearing and seeing the witnesses. See case of *Okeno v R* [1972] EA, 32. To appreciate that role it is necessary that we summarize the evidence adduced before the trial court as below.

3. In total, the prosecution relied on the evidence of four (4) witnesses to prove the information against the appellant. The evidence adduced was that on June 24, 2013PW1, Ahmed Bishar Ali and PW2, Yuni Farah Mohamed were with the deceased walking when they heard someone screaming asking for help in Somali language. The man screaming was being accosted by youth who wanted to steal his mobile phone and was specifically calling out to the deceased for help, the deceased crossed the road to help. The incident occurred about 7 meters away and they could recognize the thieves as it was about 6:30pm hence, it was not dark and there were electric lights from the nearby shops. They recognized

the appellant who had a knife in his hand which he used to stab the deceased on the left side of the chest. Members of the public got interested and that is when the appellant ran away. The deceased was rushed to Wood Street Hospital and later to Aga Khan Hospital where he died. PW1 and PW2 were shown pictures to identify the culprit and they confirmed it was the appellant though they knew the appellant before the incident occurred.

4. PW3, No. 65240 CPL. Owuor Steve attached to CID Starehe, testified that he was the investigating officer of the case. On August 13, 2013he was called by DCIO and assigned the case to investigate and the suspect was already in custody. He went to Pangani Police Station and got the Occurrence Book (OB) extract which had the telephone number of one Hasal Kassim whom he asked to bring witnesses who saw the incident. He brought two witnesses, being PW1 and PW2. The deceased's cousin also came and brought a picture of the one who had stabbed the deceased. He recorded their statements and proceeded to Aga Khan Hospital where he got a document indicating that the deceased was dead on arrival. He also got a copy of the burial permit and charged the appellant after taking him for medical examination which confirmed that he was fit to stand trial.

5. PW3 stated that the murder weapon was never recovered, The appellant was arrested on 13th August 2013 within Eastleigh by members of the public over muggings and robberies. He added that the witnesses who saw the incident did not need to identify the appellant as they knew him before the incident and there was therefore, no need of an identification parade and that the appellant had also been charged with robbery with violence in the Magistrate's Court regarding the same incident but parties settled the case out of court.

6. PW4, Dr. Peter Muriuki Ndegwa a pathologist working with the Ministry of Health, Medical Legal Section testified that he carried out a limited post mortem examination on the deceased's body. Externally, there was a penetrating stab wound on the left anterior chest wall on the left pericardium just underlying the heart, 5cm long just inside the left nipple on the level of 4th and 5th ribs on the left. The stab wound was ellipsoid most likely from a single edged

   weapon. He formed the opinion that the cause of death was extrangulation or haemorrhage due to stab wound by a sharp object. He produced the Post Mortem report in evidence.

7. Placed on his defence, the appellant gave a sworn testimony. He testified that on the material day, he played football until 6:30pm, when on his way home he saw some youth fighting and he recognized one of them and so he went to intervene. The deceased was one of the youths fighting. He went to help him as he was his friend. He pulled him from the fight and noticed that he was bleeding on his left chest. The deceased told him that he had been stabbed by one man he had been fighting with but that he was not badly injured, thus, he would not go to hospital. He never saw the knife that the deceased was stabbed with. He went home and at about 9.00pm a friend called him and informed him that the deceased had died. He was arrested on August 12, 2013by two police officers for a robbery case and taken to Pangani Police Station. There he met the deceased's sister who told him to produce one Issa, who was the man fighting the deceased and if not, he would bear the burden and be charged with murder. He was placed in the cells and charged with the murder of the deceased. He reiterated that he did not have a knife, never stabbed the deceased and their families had since settled the matter.

8. He further stated that he never saw PW1 and PW2 at the scene and that the two lied when they testified that he was in the fight. That he had negotiated with the deceased's family and settled through Maslaha by following the Muslim faith and paid 100 camels to the family of the deceased.

9. Before the trial court could deliver the judgment, an application was made by the appellant's counsel for plea bargaining as the two families were negotiating an out of court settlement pursuant to the

Somali culture, law and religion. The prosecution opposed the said application and the court dismissed it.

10. In its judgment, the trial court (Lessit, J. as she then was) found the appellant guilty as charged and sentenced him to death.

11. Being aggrieved by both the conviction and sentence, the appellant filed his Memorandum of Appeal in which he raised 4 grounds of appeal as follows; - That the High Court erred in law by failing: in its duty to re-evaluate the evidence as a whole and as a result reached a decision which was insupportable in regard to the entire evidence adduced in court by all the prosecution witnesses which was a contradiction and inconsistency; to observe that the ingredients of murder charge were not met as per the circumstances of the case; to observe that in law it was duty bound to make an independent opinion in relation to the burden of proof and by upholding conviction and sentence without observing that the entire prosecution case was impeachable under section 163(1) of the *Evidence Act*, thus unworthy to be relied upon.

12. The appeal was argued by way of written submissions with oral highlights by learned counsel, Mr. Nyambeya for the appellant and Mr. Omondi learned Prosecution Counsel for the State.

13. Mr. Nyambeya, submitted that from the evidence of the investigating officer, the trial court failed to appreciate the evidence of the witnesses and it was clear no investigation was carried out as the investigating officer merely relied on information given by witnesses who never testified. That the murder weapon was never recovered which ought to have raised reasonable doubt, as to the culpability of the appellant. Further, the alleged victim of the robbery was never called as a witness, thus creating a gap in the prosecution case. Counsel posited that the level and quality of the evidence was casual and superficial to warrant the conviction of the appellant, that articles 25(c) and 50 of *the Constitution* were violated consequent which the appellant was not accorded a fair trial as it took 15 months for the appellant to be allocated a lawyer, the judge was indifferent, the prosecutor's conduct was questionable and that the evidence adduced did not discharge the burden of proof beyond a reasonable doubt. It was the counsel's submission that the appellant was not armed but had gone to assist a robbery victim and in the absence of the evidence of the victim of the robbery and the robbers, a benefit of doubt accedes, which should have been resolved in favour of the appellant. Counsel urged us to look at the evidence of the witnesses with circumspection in that it did not accord with the judgment of the trial court.

14. In rebuttal, Mr. Omondi submitted that the prosecution proved how the deceased died following a stab wound, an act that was witnessed by PW1 and PW2 who positively identified the appellant at the scene. There was sufficient light that enabled the positive identification of the appellant who was well known to the two witnesses. That in view therefore, the appellant's admission that he was at the scene but did not stab the deceased was a mere denial. That the fact was that the appellant had armed himself with a dagger in a public place so that he could commit a felony. That although the victim of the robbery was not called, the fact is that the appellant stabbed the deceased to prevent him from thwarting a robbery incident. That the judge considered that the murder weapon was not recovered and found that even without it, the evidence of PW1 and PW2 proved that a weapon was used in the murder of the deceased.

15. Mr. Nyambeya responded that PW1, PW2 and PW3's evidence was contradictory in terms to its veracity, it was also clear that the identification parade was abandoned, the appellant denied stabbing the deceased and the so-called knowledge of the incident of PW1, PW2 and PW3 does not add up and is brought to doubt by the circumstances of the case. It was his submission thus, that an identification parade was critical so as to erase doubt that the appellant was culpable.

16. We have considered the evidence, the grounds of appeal and the respective submissions. We find the issues arising for determination in this appeal are whether the: evidence tendered

> was contradictory and inconsistent; appellant was accorded a fair trial; prosecution failed to call crucial witnesses and whether the court should make an adverse inference against the prosecution for failing to call certain witnesses; offence of murder was proved to the required standard and this court should exercise its discretion and interfere with the death sentence imposed on the appellant.

17. The appellant submitted that the evidence from PW1 and PW2 was contradictory and inconsistent as the same was generalized, scanty, inadequate, uncoordinated, shambolic and not cogent, thus not proving the ingredients of murder. It is not evident to us what exactly was contradictory and inconsistent of the two witnesses' testimonies. Both PW1 and PW2 testified as to what they witnessed, their evidence was that the two met earlier, ran errands and passed by the deceased's house for a while and later on their way to dinner they saw three people robbing a man who called out to the deceased to help him. The deceased was then stabbed by the appellant who was previously known to them as he was lending a hand to the robbery victim and the appellant fled the scene. The deceased was rushed to hospital where he died and was buried the next day. The two witnesses' testimony does align as to the events of the material day in question and we do not find merit in the contention that the prosecution witnesses' testimony was contradictory or inconsistent.

18. As to whether the appellant was accorded a fair trial, the appellant submitted that his rights as envisaged in article 25 (c) and 50 of the *Constitution* were violated on the grounds that the Director of Public Prosecution (DPP) took 15 months to allocate the file to a prosecutor, material witnesses were not called to testify, the witnesses recorded their statements two months after the incident, no identification parade was conducted and no murder weapon was produced.

19. Article 25(c) of the *Constitution* falls under the fundamental rights and freedoms that may not be limited with the right to a fair trial being one of them. Article 50 on the other hand outlines what constitutes the rights to a fair trial. We have not been able to isolate a specific right amongst those enunciated under Article 50 that was violated. We do not hesitate to add that in criminal proceedings, there is no limitation of time within which a charge can be filed. What is paramount is that once the DPP forms the decision to charge, an accused should be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence (see article 50(2)(j)). The appellant herein has not alluded that this provision was violated.

20. It is trite law that a violation of the right to a speedy trial if proved can only found an action for damages. We refer to the case of *James Kabwaro Nyasani v. R* Nakuru Cr Appeal No 54 of 2011 (Unreported) in which it was stated that;

> " The appellant's complaint that the original trial was a nullity by reason of alleged violation of his constitutional rights under section 72(3) of the former Constitution cannot, with respect, succeed. We note that the appellant never raised this issue before the trial court...We view his attempt to raise the said questions here an afterthought ... that even if there had been such violation, which there is not, the appellant's recourse would have been in damages."

21. In view therefore, we conclude that if the appellant feels that his right to a fair trial was violated, he has a recourse in pursuing redress for damages in a civil suit. Be that as it may, we do not find that any of his rights under Article 50 were violated and the ground of appeal in this regard fails.

22. On the ground that crucial witnesses were not called to testify being the robbery victim, though it would have been prudent to have the said victim testify, his failure to do so did not water down the prosecution's case as he would not have added any value to the prosecution case other than to repeat what PW1 and PW2 testified. We are therefore, in agreement with the respondent's submission that this was a murder case and not a robbery case and what is paramount is whether the murder charge was proved to the required standard. Further, section 143 of the *Evidence Act*, cap 80, Laws of Kenya explicitly states that no particular number of witnesses in the absence of any provision of law to the contrary is required to prove any fact. We find no miscarriage of justice was occasioned to the appellant for the failure to call that witness due to the peculiar circumstances surrounding the commission of the offence as aptly narrated by PW1 and PW2.

23. The appellant also faulted his identification on the ground that no identification parade was conducted. It is our considered view that this was a case of recognition and not identification of a stranger, for evidence on recognition to be sustained, the witness is obligated to state that he/she knew the assailant prior to the incident, state the length of time he has known the assailant, give reasons as to why he/she was sure the assailant was the person he/she knew before and that there was no mistaken recognition.

24. It is also well settled in law that the evidence of recognition is more reliable than that of identification. See *Anjononi v Republic* ([1980] KLR 59. The Court had this to say:

> "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 another"

25. PW1 and PW2 both testified to having known the appellant before the incident and the appellant in his defence averred that he knew both the deceased and PW1. It was established that the appellant was not a stranger to the witnesses. This was a case of positive recognition of a person known to the witnesses as opposed to identification of a stranger, as such the failure to conduct an identification parade was not prejudicial to the appellant nor was it needed and would have been superfluous in any event.

26. The appellant also complained that the murder weapon was not adduced in evidence which weakened the prosecution case and cast a doubt as to his culpability. Indeed, the murder weapon was never produced. PW1 in his testimony testified that "I saw that the appellant had a knife in his hand, it was Rambo with a thick handle and a blade-dagger". As to what weapon was used in the murder was corroborated by PW4'S testimony that the deceased had a penetrating stab wound most likely from a single edged weapon. There is no doubt that the fatal injury was a single edged weapon. In the case of *Karani v Republic* (2010)1 KLR 73, this court stated thus:

> "The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit."

27. It is our view that even if the murder weapon was not produced, the prosecution was able to demonstrate what caused the death of the deceased. Thus, the failure to produce the weapon was not fatal to the prosecution's case as no prejudice was suffered by the appellant. Consequently, this ground of appeal equally fails.

28. As to whether the prosecution proved its case beyond a reasonable doubt, section 203 of the *Penal Code* provides as follows:

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

29. Section 206 of the same Code defines what malice aforethought is. It provides as follows:

> " 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."

30. The death of the deceased is not in dispute and we do hold that the testimonies of PW1 and PW2 were consistent with the fact that it was the appellant who stabbed the deceased causing him to suffer a fatal injury. The question is whether the appellant had mens rea or the intention, to cause the death of the deceased. The trial court in addressing itself on this issue held that it was satisfied that the appellant "stabbed the deceased, with the clear intention of one preventing the deceased from resisting the robbery of a mobile phone from the victim of the robbery. Secondly, it was to aid the accused accomplices complete the robbery". It is evident that the appellant had formed the intention to either cause death or grievous harm in stabbing the deceased so that he could not thwart the robbery. The prosecution thus discharged the burden in proving that the appellant intended to either cause the death of, or grievous harm to, the deceased.

31. In *Omar v Republic,* [2010]2 KLR, 19 at page 29, this court differently constituted expressed the same principle as follows:

> " So by the appellant hitting the deceased on the neck with a bottle, he must have intended to cause her at least grievous harm. Indeed the blow using a bottle caused a fatal wound on the deceased. The evidence clearly shows the appellant had the necessary malice aforethought".

32. We are satisfied that the trial court did not misdirect itself in holding that malice aforethought had been proved under section 206 (c) of the *Penal Code*. Ultimately, we are in agreement with the trial court that the appellant, with malice aforethought, was responsible for the death of the deceased.

33. We now turn to the issue of sentencing. It is evident from the proceedings of the trial court that the appellant was afforded a chance to provide mitigation before he was sentenced by the trial court and that the court addressed its mind to the mitigating factors before sentencing him. We note, however, that by the time the sentence was passed, the death sentence was perceived to be the only lawful sentence. Jurisprudence has changed since the Supreme Court decision in *Francis Karioko Muruatetu*

& another v Republic [2017] eKLR, where the court held that although the *Constitution* recognizes the death penalty as being lawful, it does not provide that when a conviction of murder is entered only a death sentence should be imposed. Consequently, the Supreme Court declared the mandatory nature of the death sentence provided under section 204 of the *Penal Code* as unconstitutional.

34. On our part, we note that the appellant is a young man with his whole life ahead of him and we find he should benefit from this jurisprudential paradigm and have the death sentence set aside. In the circumstances, we are entitled to interfere with the sentence which we hereby do. Having regard to the circumstances of the case, we set aside the death sentence meted out by the trial court and substitute it with one of twenty (20) years imprisonment to run from the date when the appellant was arraigned in the High Court.

35. In the end, the appeal on conviction is dismissed but the appeal on sentence partially succeeds to that limited extent only.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

.....

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