Waweru v Republic (Criminal Appeal 98 of 2020)
[2023] KECA 622 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 622 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 98 OF 2020

AK MURGOR, S OLE KANTAI & GWN MACHARIA, JJA

MAY 26, 2023

BETWEEN

DAVID MWEHA WAWERU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal against the Judgment of the High Court of Kenya at Nairobi (Lesiit, J.) delivered on 1st October, 2015 in Criminal Case No. 33 of 2014)

JUDGMENT

1. The appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. It was alleged that he murdered Samson Njoroge on June 30, 2013 at Kariobangi North location within Nairobi county. During trial, the prosecution called seven witnesses while the appellant gave a sworn statement and called no witnesses. Upon trial, he was convicted as charged and sentenced to death.

2. In considering the issues before us, we remind ourselves that this is a first appeal, and as a first appellate court, we have to reconsider the evidence adduced before the trial and re-evaluate it afresh. In doing so however, we have to bear in mind that we did not have the advantage of seeing and hearing the witnesses as the trial court did for which we must give due allowance. In so holding, we are guided by the case of *Okeno v Republic* [1972] EA, 32 where the then East African Court of Appeal stated on the duty of this court on first appeal:

> " 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: On June 30, 2013 at about 8.00pm, PW1, Simon Gichuhi Ndung'u was locking up his workshop at Kariobangi Light Industries when he heard voices on the road 3-5 meters away. PW2, Francis Maina Kamau, a welder in the same industries was also in his workshop at the time, when he heard people quarrelling three doors away, outside a bar. PW1 and PW2 checked and saw four people, being Samson (hereafter the deceased), the appellant, John and Nkiri. They overheard the deceased and the appellant, both of whom were well known to them, arguing over alcoholic drinks. The deceased was telling the appellant that he had no money to purchase alcohol. An altercation ensued then PW1 and PW2 saw the appellant draw a kitchen knife from the right side of his waist and stab the deceased on the left side of the abdomen and left shoulder. They heard the appellant saying that he had stabbed the deceased and that there was nowhere they could take him before walking away with Nkiri, while John remained with the deceased and attempted to administer first aid.

4. The following morning around 7.00am, the deceased's cousin PW3, Eliud Ngugi Mbugua, received a call from the deceased's cell phone number. The caller informed him that the deceased had been stabbed with a knife. PW3 went to Kariobangi and found the deceased alive, laying on his side on a veranda. He examined him and saw stab wounds on his stomach and back. He took him to a nearby Catholic dispensary from where they were referred to Mama Lucy Hospital. PW3 rang the deceased's father, PW4, Joseph Ngugi Ng'ang'a at 10.00am and informed him about the incident. PW4 proceeded to Mama Lucy Hospital where he found the deceased unconscious with injuries on his stomach and shoulder. He was treated then referred to Kenyatta National Hospital where he was admitted in the Intensive Care Unit but soon after succumbed on July 2, 2013.

5. PW7, Doctor Daniel Zuriel, a consultant Pathologist at Kenyatta National Hospital performed a post-mortem on the deceased's body on July 5, 2013 at the facility's morgue. The body was identified by the deceased's brother, Joseph Ngugi and his father, PW4. Externally, the deceased had an incision wound penetrating through the lower abdomen to the intestines. Internally, the intestines were punctured and had a severe infection with pus. The lungs had severe pneumonia. PW7 formed the opinion that the cause of death was a penetrating abdominal injury due to a stab wound by a sharp object and severe pneumonia. The doctor explained that due to the stab wound, the deceased developed a severe infection in the abdomen, which spread to the intestines and lungs causing pneumonia.

6. The appellant fled the area and was not seen again until April 20, 2014. On that date, PW1 and PW2 saw him entering R.V Pub in Kariobangi. PW1 alerted the bar manager who informed the owner, who in turn contacted the police. PW6, Sgt Abdiasil Mohamed Noor of Kariobangi Police Station happened to be on mobile patrol in Kariobangi at the time when he received a call from emergency number 999 instructing him to proceed to the bar. He went there and found the appellant surrounded by a large crowd. PW6 arrested him and took him to Kariobangi Police Station where he was detained. On the same day, the OCS instructed PW5, PC Richard Ratemo of the same police station, Crime Branch Section to investigate the case. PW5 noted that according to their records, the incident was first reported at the station sometime in 2013 by the deceased's father (PW4) on July 4, 2013. The report was that the deceased was stabbed in the lungs. In executing his mandate, PW5 recorded statements from witnesses and drew a sketch plan of the scene.

7. In his defense, the appellant denied committing the offence or being anywhere near Kariobangi when it was allegedly committed. He stated that on the day in question, he went to his place of work in Dandora where he worked until 6.00pm then returned home to his child. Regarding his arrest, he testified that on April 20, 2014, the police arrested him at about 1:30pm just after he had finished having his lunch. They falsely claimed that he had a gun yet he had never owned one. He was taken to Kariobangi Police Station where he was told that he committed a murder on June 30, 2013. According to him, this was a fabricated case since he was charged with a different offence from the one he was arrested for.

8. The trial court having considered and weighed both the prosecution and appellant's case, found that the prosecution had proved its case beyond any reasonable doubt. Being dissatisfied with the conviction and sentence, the appellant is now before this court on a first appeal on the grounds that: the ingredients of the offence of murder were not established; key and essential witnesses were not availed by the prosecution; the evidence of identification by recognition did not pass muster on the test of admissibility; his cogent defence was dismissed without good ground and the sentence was harsh, unfair and excessive and did not take into account mitigating circumstances.

9. The appeal was canvassed by way of written submissions. The appellant was represented by learned counsel, Mr Towett while the respondent was represented by learned state counsel, Mr Muriithi. Mr Towett submitted that the prosecution did not prove the offence of murder to the required standard. He argued that the prosecution failed to establish that the appellant had malice aforethought and/or that he knew that his actions on the material night of the incident, would lead to the death of the deceased, as required under section 206 (b) of the *Penal Code*. Counsel argued that, the appellant may have been intoxicated, reason wherefor he may not have had the mens rea to conceive or perform any unlawful act. Further, that the prosecution failed to call a crucial witness, namely John and Nkiri who were in the company of the deceased when the deceased was allegedly assaulted. That the evidence of the two witnesses, if adduced, would have shed more light on what transpired at the scene, and more particularly that it is not the appellant who killed the deceased. That the failure to call the said John and Nkiri no doubt was fatal to the prosecution's case, which implied that the conviction of the appellant was based on unsubstantiated evidence. The appellant relied on the case of *Nzuki v Republic* Criminal Appeal No 70 of 1991 claiming that it is on all fours with his case.

10. Counsel also submitted that the case against the appellant was fabricated as demonstrated by the fact that the witness statements were recorded months after the incident. He also faulted the trial court for failing to consider the appellant's *alibi* defence which, if it had been considered, would have exonerated him.

11. As regards sentence, counsel urged that the mandatory death sentence meted out by the learned trial judge be set aside in view of the Supreme Court decision in case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR. He urged us to remit the matter back to the trial court for re-sentencing pursuant to the said decision.

12. In rebuttal, Mr Muriithi submitted that malice aforethought was evident in the fact that the appellant not only had a killer knife but, stabbed the deceased twice, first in the abdomen then on the shoulder, which was cold blooded killing without any provocation. He submitted that the prosecution failed to call John and Nkiri because they were unavailable. That even if the two never testified, the evidence of PW1 and PW2 pointed to the fact that no one else other than the appellant killed the deceased. Further, that there is uncontroverted evidence that the appellant bragged that he had stabbed the deceased and no one would do anything about it. Counsel added that this is not a suitable case for re-sentencing or varying the sentence as the appellant has not conceded that he committed the offence. We were urged to uphold both the conviction and sentence.

13. We have considered the evidence adduced before the trial court, the respective submissions, authorities relied upon and the law. In our view, the only issues arising for determination are whether; the prosecution proved its case against the appellant beyond any reasonable doubt, the prosecution failed to call crucial witnesses and whether this court should exercise its discretion and interfere with the death sentence imposed on the appellant.

14. As regards the first issue, section 203 of the *Penal Code* defines the offence of murder as follows:

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

15. From this definition, for a conviction for the offence of murder to be sustained, the prosecution must prove the fact and cause of the death of the deceased, that the death was caused by an unlawful act or omission of the appellant and that the appellant had malice aforethought when he committed the acts that led to the death of the deceased.

16. The first issue is not in contestation as, the evidence of PW7, the Pathologist who conducted the post mortem on the body of the deceased confirmed the death of the deceased. The deceased succumbed to injuries at Kenyatta National Hospital's Intensive Care Unit on July 2, 2013. In his opinion, the deceased died from a penetrating abdominal injury due to a stab wound by a sharp object and severe pneumonia. Before the post mortem was done, the body was identified by the deceased's brother, Joseph Ngugi and his father, PW4. Having answered the first issue, we now turn on to whether it is the appellant who caused the death of the deceased.

17. The evidence of PW1 was that he knew the appellant for 3 years having worked near where he worked. PW2 testified that he knew the appellant for 5 years as he used to pass by his workshop and find him in various clubs. Both witnesses were adamant that they saw the appellant argue with the deceased before retrieving a knife from his waist and stabbing the deceased twice; they gave a description of the murder weapon which was a knife with a wooden handle. The two witnesses thereafter saw the appellant wipe the blood off the knife on the ground and taunted the deceased that; "I have stabbed him, but you will not take me anywhere." The appellant then walked away leaving the deceased bleeding.

18. From the foregoing, we are satisfied that it was the appellant who stabbed the deceased, there was light that illuminated the scene and he was well known to PW1 and PW2, thus there was no error in his identification as the perpetrator.

19. On whether the appellant had malice aforethought when he killed the deceased, 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."

20. In the case of *Nzuki v Republic* [1993] eKLR, this court defined malice aforethought as:

> "...a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of *Regina v Vickers*, [1957] 2 QB 664 at page 670. An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of *Conliffe v Goodman*, [1950] 2 KB 237."

21. In the same case, the court went on to state:

> "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. In *Republic v Tubere S/O Ochen* (1945) 12 EACA 63, the then Eastern Africa Court of Appeal, set out the following factors to be considered in determining whether malice aforethought has been established;

> "The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident."

23. In this case, we concur with the learned trial Judge that malice aforethought was established by the prosecution. Prior to the incident, the appellant was armed with a knife which is no doubt a dangerous weapon. It is clear that he intended to cause the deceased grievous harm as he stabbed him in the abdomen where critical body organs are located. After stabbing the deceased, he was overheard bragging that no one could take him anywhere. We find that the trial court did not err when it held that

the appellant's actions were aimed at the deceased and were intended to cause death or grievous harm and were deliberately carried out even though the appellant knew they could cause death. Furthermore, the appellant's action of departing from the crime scene and fleeing from the area are wanting; the incident occurred on June 30, 2013 and the appellant was sighted in the same area on April 20, 2014. This was almost one year after the incident and we cannot help but draw an inference that the appellant's actions are in tandem with the actions of a guilty mind and not consistent with that of an innocent person.

24. The appellant has also challenged his conviction on the basis that the prosecution failed to call crucial witnesses, being John and Nkiri who were persons in the company of the deceased at the time of the incident. In *Julius Kalewa Mutunga v Republic* [2006] eKLR the court stated;

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

25. Section 143 of the *Evidence Act* provides that:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

26. The circumstances of this case are that, the witnesses who were called by the prosecution sufficiently established its case. An adverse inference can only be drawn if the failure to call particular witnesses weakens the prosecution case. The said John and Nkiri in our view, would just have adduced repetitive evidence that was adduced by PW1 and PW2. Although it would have been prudent to call John and Nkiri, we are unable to conclude that the failure to call them adversely affected the prosecution case. And neither did the failure to call them prejudice the appellant in any way. In any case, the investigating officer, PW5 explained that he was unable to trace them, we do not think that his failure to record their statements was influenced by some oblique motive. We find that the prosecution called a sufficient number of witnesses to prove that the appellant committed the offence of murder. This ground of appeal has no merit.

27. As regards learned counsel, Mr Towett's submission that the appellant may have committed the offence due to intoxication, is a matter we think does not fall for our consideration. We say so because the appellant did not advance a defence of intoxication and it was neither an issue brought up during cross examination of any witness. We hold that the appellant's defence was properly considered and dismissed by the learned trial judge; and on the same grounds of want of merit, we too, dismiss it accordingly.

28. We are therefore satisfied that the prosecution proved the offence of murder beyond any reasonable doubt and the appeal against conviction is unmeritorious.

29. On whether this court should interfere with the death sentence imposed on the appellant, it is important to note that this court can only interfere with a sentence passed by the trial court if it is satisfied that the trial court erred in the exercise of its discretion. In *Ogolla s/o Owuor v Republic*, (1954) EACA 270 the East African Court of Appeal stated thus:

> "The court does not alter a sentence unless the trial judge acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the

sentence is manifestly excessive in view of the circumstances of the case (*R v Shershowsky* (1912) CCA 28TLR 263)."

30. In the instant appeal, the learned judge sentenced the appellant to death as it was the only sentence prescribed by law at the time under section 204 of the *Penal Code*. However, the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR found that the mandatory nature of the death sentence was unconstitutional, as it does not allow the consideration of the mitigating factors put forth by the accused in order to determine an appropriate sentence that meet the ends of justice. Death sentence is however not outlawed as the Supreme Court held that it is still applicable as a discretionary maximum penalty.

31. A perusal of the trial court's record reveals that the appellant did not tender any mitigation for consideration prior to sentencing. We therefore find that this is an appropriate case for this court to intervene and interfere with the death sentence imposed. However, due to passage of time and in the spirit of reducing case backlog, we see no reason as to why the matter should be remitted back to the High Court for mitigation and resentencing.

32. 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 thirty (30) years imprisonment with effect from the date of arrest, being April 20, 2014.

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

A. K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR