Lugo v Republic (Criminal Appeal 8 of 2022) [2023] KECA 506 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 506 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 8 OF 2022

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

MAY 12, 2023

BETWEEN

SAFARI KATANA LUGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal arising from the judgment of the High Court of Kenya at Malindi in respect of Criminal Case No.413 of 2020 by the Justice R. Nyakundi delivered on 22nd December, 2021 at Malindi)

JUDGMENT

1. The Appellant, Safari Katana Lugo, was charged before the High Court in Malindi in Criminal Case No 8 of 2022 with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars were that on March 5, 2020, he murdered Kazungu Lugo Fondo alias Chifu Mwange.

2. The Prosecution's case was that on 5th March, 2020, at about 2.30pm, while a meeting for the funeral arrangements was in progress for one Mariam Kanze Kazungu, the Appellant went to the meeting place and found the deceased, Kazungu Fondo, seated. According to PW1, Raymond Salim Masha, the Appellant kicked the deceased and the deceased fell down. After that, the accused armed himself with a stone and used it to hit the deceased on the forehead. This evidence was confirmed by PW2, Pendo Kazungu, and PW3, Bahati Chare Hare, who in their evidence stated that they saw the Appellant hit the deceased in the face with a stone. According to PW6, Kitsao Ngombe Kariuki, who was at the same meeting, the Appellant went to the place where the meeting was being held and assaulted the deceased on the chest. After, that the Appellant inflicted further injuries before finally hitting the deceased with a block of stone after disengaging himself from the grasp of those who were trying to restrain him.

3. After the incident, the deceased was ferried to the Hospital but died on arrival. PW4, Dr Ruth Nyangi, the pathologist who conducted a post mortem examination of the body of the deceased formed the

opinion that the deceased died from head and chest injuries arising from linear skull fracture and left parietal haemorrhage.

4. PW7, Sgt Martin Wanjala, investigated the incident and recorded statements from the witnesses. According to his investigations, it was alleged that the deceased had bewitched Mariam. However, the post mortem examination of that child revealed that she had died of natural causes having been diagnosed with diabetes and not from witchcraft.

5. Upon being placed on his defence, the Appellant in his sworn evidence, testified that on March 5, 2020 he was in his homestead with his wife when his sister in law went to inform him that Mariam had been killed. The said death occurred when he was in Mombasa hence he did not know what killed Miriam. He went to the home where the funeral was and upon his arrival between 2pm and 2.30pm, he found two groups from his mother's and father's sides respectively confronting each other. In their midst were some people who were seated on the ground surrounded by a mob, one of whom was the deceased. According to what he heard, the people being surrounded were not following instructions regarding the burial of the said Miriam and a conflict ensued between the two family groups. By that time, the deceased herein was explaining to the mob the issue regarding his daughter who had mental problems. The Appellant revealed that earlier on the deceased had made a report to the police that the Appellant had threatened his life and fearing for his life, the Appellant left the scene. By the time of his leaving the scene, the deceased had not been assaulted. It was however, his evidence that from his observation the conflict was likely to escalate. In his evidence, he did not know who killed the deceased and the prosecution's case against him was fabricated.

6. In his judgement, the Learned Trial Judge found, based on the post mortem report produced, that the deceased suffered serious injuries to the head, skull and forehead, hence it was proved that the deceased died. The Learned Judge found that from the evidence of the witnesses, the death of the deceased was as a result of an unlawful act. Regarding malice aforethought, the Learned Judge found that the act of the Appellant arming himself with a stone was evidence that his action was premeditated and deliberately meant to endanger the life of the deceased by targeting the vulnerable part of the body of the deceased, the head, resulting into death. The Learned Judge had no difficulty in finding that it was the Appellant who inflicted the fatal injuries based on the evidence of PW1, PW2 and PW6.

7. Regarding the Appellant's defence, the Learned Judge found that it was merely a rebuttal and was not supported with cogent and specifics of evidence necessary to controvert the prosecution's case on recognition. He therefore found that notwithstanding the alibi defence by the Appellant, the prosecution fully discharged the burden of proof beyond reasonable doubt. Consequently, he found the Appellant guilty of the offence of murder and convicted him accordingly. He proceeded to sentence the Appellant to 30 years imprisonment.

8. Aggrieved by that decision, the Appellant has preferred this appeal in which he has relied on the following grounds:

    i. That the learned judge erred in law by failing to consider that in charging the appellant under Sections 203 as read with section 204 of the Penal code, the prosecution case did not lead (sic) evidential burden of proof or evidence to the required standard of the law to identify the appellant as the perpetrator of the crime.

    ii. That the learned judge erred in law by failing to consider that the documentary evidence by professional post-mortem report produced by the prosecution as per the exhibit did not meet the threshold of the law required,

iii. That the learned judge erred in law by failing to consider that the investigation officer did not reflect anything to link the appellant to the alleged offence of murder.

9. At the hearing of this appeal, which was conducted on the Court virtual platform, the Appellant, who was represented by Learned Counsel, Mr Joseph Kihara, appeared from Malindi prison while the Respondent was represented by Mr Mwangi Kamamu who held brief for Mr Nyoro.

10. It was submitted on behalf of the Appellant that, on the authority of *Republic v James Njenga Njoroge [2019] eKLR*, the Appellant did not harbour any vengeance against the deceased hence the component of malice aforethought which makes up the mens reus was not established. It was further submitted that the Appellant raised an alibi defence which the High Court ought to have carefully analysed, since, according to the decisions of this Court in *Republic v Peter Keremoni Itukan [2017] eKLR*, *Kiarie vs Republic (1984) KLR 73* and *Wangombe vs Republic (1976— 8O) 1 KLR 1683*, the accused does not have to establish that his alibi is reasonably true. All he has to do is create doubt as to the strength of the case for the prosecution. According to the Appellant, where the prosecution case is thin, an alibi which is not particularly strong may very well raise doubt.

11. It was further submitted that it was an error on the part of the prosecution to rely on the stone as the murder weapon when the same was not subjected to forensic examination and the witnesses who identified the stone at the scene were never called as witnesses. While the Appellant appreciated that a conviction may be arrived at even when the murder weapon was not recovered or produced in the murder trial, it was submitted that the said case was distinguishable from the instant case for the reason that since the stone was produced into evidence as being the murder weapon, there was need by the prosecution to tie all the knots in its evidence by carrying out a forensic review of the blood stained-stone.

12. We were therefore urged to allow the appeal, set aside the conviction and quash the sentence.

13. On behalf of the Respondent, it was submitted, based on the evidence, that the prosecution proved that the appellant was the sole perpetrator in the murder of the deceased. According to the Respondent, since the post mortem was produced without any objection from the defence, it is now too late to raise an issue regarding its admissibility. It was submitted that the investigation officer was in the end able to connect the appellant to the offence and that the appellant's defence constituted nothing more than mere denial since the purported alibi was unsupported and no notice was ever given to the court or the prosecution.

14. We were therefore urged to uphold both the conviction and the sentence.

Analysis and Determination

15. We have considered the issues raised in this appeal.

16. This being a first appeal, it is our duty to analyse and re-assess the evidence on record and reach our own conclusions. In *Okeno vs Republic [1972] EA 32* the Court of Appeal set out the duties of a first appellate court as follows:

> ' 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 vs Republic (1957) EA.
>
> (336) And the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal

M Ruwala Vs 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 finding and conclusion; 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 vs Sunday Post [1958] EA 424.'

17. In this case, the prosecution evidence was that the deceased amongst his fellow villagers had assembled to make arrangements for the burial of a young girl, Mariam Kanze Kazungu, who apparently died from diabetes. While doing so, the Appellant arrived and assaulted the deceased. Though attempts were made to apprehend him, he however, overpowered those who were doing so, picked a stone and hurled it at the deceased's head. As a result, the deceased, who sustained serious injuries was rushed to the medical facility for treatment but unfortunately died before getting medical assistance. From the post mortem examination report, it was clear that the deceased had sustained serious injuries particularly to the head.

18. On his part, the Appellant testified that on the material day, he attended the said meeting but upon realising that a confrontation was about to occur, he decided to go away from the scene. By the time he was doing so, the deceased had not been assaulted. According to him, the deceased had earlier on made allegations against him to the police.

19. Before is it was argued that there was no evidence that there was malice aforethought on the part of the Appellant in order to sustain a charge of murder. Section 203 of the Penal Code under which the accused is charged provides that: -

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

20. Section 206 of the Penal Code sets out the circumstances which constitute malice aforethought 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 caused death or to do grievous harm to any person whether such person is the person actually killed or not.
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> b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accomplished by indifference whether death or grievous harm is caused or not, or by a wish that it may be caused or not, or by a wish that it may not be caused.
>
> c. An intention to commit a felony.
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> d. An intention by an act or omission to facilitate the flight or escape from custody of any person who attempt to commit a felony.

21. This Court stated in the case of *Nzuki v Republic [1973] KLR 171* that the offence of murder must be committed with the following intentions: -

> ' (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 his acts, and commits those acts deliberately and without lawful excuse with 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 circumstances 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. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue form his conduct is not by itself enough to convert a homicide into a crime of murder.'

22. The element of intention in committing the offence was examined in the English case of *Hyam vs DPP [1974] 2 ALL ER 41* where Lord Diplock observed as follows:

> ' No distinction is to be drawn in English law between the state of mind of one who does an act because he desires it to produce a particular evil consequent, and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act.'

23. It is therefore clear that in order to return a verdict of guilt it is not mandatory that the prosecution proves that the accused intended to cause the death of the deceased. Even if the accused did not set out to cause death to the deceased but was aware that his action might well lead to the death of the deceased, he will still be liable if death does result. Therefore, it does not matter whether he intended to cause grievous harm to the deceased, if he was aware that his action might possibly cause such harm to the deceased.

24. In this case, the evidence was that the Appellant assaulted the deceased and was restrained from causing further injury. However, he managed to free himself from the grip of those restraining him, picked a stone and hurled it at the head of the deceased. In our view, by doing so, he must have been aware that such action, aimed at the head of the deceased, an old man, might cause grievous harm to the deceased. It matters not that that was not his intention. That he was restrained but still persisted in causing more harm to the deceased, is a further indication that the harm or injury caused to the deceased was not just accidental or in the heat of the moment but was deliberate. In the premises, we have no reason to disagree with the Learned Judge that malice aforethought was established.

25. It was further submitted before us that the court failed to give due regard to the defence of alibi. According to the Appellant, he left the scene before the deceased was assaulted. In other words, his defence was that at the time of the commission of the offence he was not present. He however admitted that he was present at the scene shortly before the deceased was assaulted. He was seen by PW1, PW2, PW3 and PW6. He did not deny that these witnesses were at the scene. It is true that there were many people present at the scene. However, these witnesses who knew the Appellant very well were categorical that it was the Appellant who assaulted the deceased and no one else. To their credit they did not attempt to concoct a reason why the Appellant would kill the deceased. That should clear any

doubt as regards the suggestion that their evidence was fabricated to nail the Appellant. They only stated what they saw and nothing else.

26. These witnesses were related to the Appellant and whereas the Appellant alleged that there was a misunderstanding between him and the deceased, there was no allegation that these witnesses similarly had grudges with the Appellant. Whereas they may not have stated exactly the same thing, as was held by this Court in *Philip Nzaka Watu vs Republic[2016] eKLR*:

> ' When it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.'

27. In this case, there was unanimity in the evidence of PW1, PW2, PW3 and PW6 that the Appellant threw a stone at the deceased which hit the deceased's head. Some of the witnesses stated that they were not present when the Appellant first assaulted the deceased but they did see the last assault. In our view it is not necessary that all the witnesses must say the same thing in exactly the same way and manner in order for the Court to believe them. There must be room for disparity arising from human recollection which is not infallible. In this case, the inconsistencies, if any, were very minor, trifling and immaterial.

28. The Learned Trial Judge was faulted for not giving due regard to the defence of alibi. That defence was to the effect that the Appellant left scene shortly before the assault on the deceased. However, the evidence of PW1, PW2, PW3 and PW6 not only placed the Appellant at the scene, but was clear that it was the Appellant who committed the acts that led to the death of the deceased. In our view, in light of that evidence, we are not satisfied that the Appellant's alibi defence was such that a doubt was created as to the strength of the case for the prosecution which we find was very cogent.

29. As regards the failure to subject the weapon, the stone to forensic examination, as appreciated by Learned Counsel for the Appellant, 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. Where the weapon is produced, as happened in this case, it makes the prosecution's case even stronger though it was not subjected to forensic examination. See *Karani vs Republic (2010)1 KLR 73* and Ekai v Republic (1981) KLR 569. In this case apart from the said stone there was evidence that the Appellant was seen physically assaulting the deceased before he hit him with a stone.

30. On the admissibility of the post mortem report, as rightly submitted by the Respondent, that issue was not raised before the trial Judge and as no decision was made as regards its admissibility, the same cannot be raised for the first time on appeal, particularly since the law permits the admissibility of such documents in such circumstances. In an appeal against a decision of the Court, the appellant is expected to point out the manner in which he believes the trial Court erred. It is not a forum where the iniquities of the prosecution are challenged. Therefore, where the prosecution proposes to proceed in a certain manner and the defence does not object, the Court, on appeal would not interfere if what was sought was an exercise of discretion, unless in the exercise of the same, it is shown that the trial

court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle.

31. We have subjected the evidence to fresh scrutiny and we find no reason to fault the Learned Judge's finding on conviction. As regards the sentence, we were not addressed on the reason why we should interfere and we find no justification for doing so. This Court in *Shadrack Kipkoech Kogo vs R Eldoret Criminal Appeal No 253 of 2003* addressed itself on the issue thus:-

> ' Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka – vs- R (1989 KLR 306).'

32. The circumstances under which this Court, and any appellate court for that matter, interferes with the exercise of the discretion by the trial court in imposing a sentence were restated by this Court in *Bernard Kimani Gacheru vs R [2002] eKLR* as follows:

> ' It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist. The position was stated succinctly by the Court of Appeal for East Africa in the case of *OGOLA s/o OWOURA VS REGINUM (1954) 21 270* as follows:-
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> > 'The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James V R, (1950) 18 EACA 147*:
> >
> > > ' It is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R V Sher shewky, (1912) CCA 28 TLR 364.'
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> > Ogola s/o Owoura's case has been accepted and followed by this Court and the High Court on matters of sentence for many years. What was stated there still remains good law to-date...In the appeal before us, the learned trial Judge made comprehensive notes on sentence. He took into account everything that was urged before him by the appellant's advocate. He did not disregard any material factor, nor did he take into account any matter immaterial. Similarly, he did not act on any wrong principle. The very same matters that the appellant urged before

> us were urged before the learned trial Judge and he took all of them into account. The sentence was entirely in the discretion of the learned trial Judge and we are satisfied that he exercised that discretion properly and on the facts before him. The sentence he gave was well deserved and was not manifestly excessive. We have found absolutely no reason to interfere with it and for these reasons, we order this appeal to be and is hereby dismissed in its entirety.'

33. In this case, the Appellant was liable to be sentenced to death but the Learned Trial Judge imposed 30 years imprisonment. We have no reason to interfere with that sentence since we have not been persuaded that the said sentence was manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle.

34. In the result, this appeal fails and is dismissed in its entirety.

35. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF MAY, 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR