Mulwa & another v Republic (Criminal Appeal 21 of 2021)
[2023] KECA 553 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 553 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 21 OF 2021

MSA MAKHANDIA, GWN MACHARIA & WK KORIR, JJA

MAY 12, 2023

BETWEEN

SALIM NGUTHU MULWA ..... 1ST APPELLANT

MATHEW MAKAU MUNUITHYA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the Judgment of the High Court at Nairobi delivered on 11th January 2017 by L. Mutende, J.) in Criminal Case No. 64 of 2015)

JUDGMENT

1. The appellants were charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars were that on March 24, 2012 at Kyambusya village in Kyambusya Sub-location, Kalimani Location in Matinyani District in Kitui County the Appellants jointly murdered Rose Mutati.

2. We remind ourselves that this being a first appeal it is our duty and obligation to re-evaluate and re-analyze the evidence adduced before the trial court. In doing so, we have to bear in mind that we did not have the advantage of seeing or hearing the witnesses give evidece and observe their demeanor for which we must give due allowance. This mandate was set out in the case of *Okeno Vs. Republic* [1973] EA 32 where it was held that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination 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. 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 would 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."

3. In discharging this mandate, we summarize the prosecution case as follows: The testimonies of PW1, Ambrose Ngala Mabindu and PW2, Ekendu Mabindu who were brothers was that, while they were asleep they were woken up by their mother who heard some screams whereupon they heard dogs barking towards the river. They followed the noise and at about 600 metres, they found the deceased lying on the ground screaming on the river bank. There was moonlight so they could clearly see the vicinity. Both appellants were also at the scene.

4. The 1st appellant had a catapult which he was using to launch stones at the deceased while the 2nd appellant had a rungu and sat besides the deceased. PW2 was familiar with the 1st appellant who stood about 1 metre from the deceased. The 1st appellant's mother who was also there held a panga and was pleading with him to stop further assault on the deceased. The 1st appellant declined stating that the deceased had disturbed him for long. The deceased had sustained injuries to the knee, a cut wound on her left leg and was screaming asking the appellants for mercy. Fifteen minutes later, three other persons named as Angeline, Musyoki and Damaris arrived. No one seemed to know the deceased but she identified herself. Later the chief was called and the two witnesses left for home.

5. PW3, Cyrus Gituati Malombe the area chief testified that he was called by PW4, Mulatya Mutunga that his sister-in-law had been caught stealing vegetables. He went to the scene with the assistant chief and enquired what had happened to which the appellants stated that four thieves came to steal their vegetables and they raised alarm and members of the public came and beat up the deceased but the other thieves ran away. He found the deceased wearing only a skirt, she had an injury on the right knee and was already dead. He called the police to come and collect the body.

6. PW5,- Musyoki Kimanzi, PW6, Agnes Ntharibi, PW7,Angelina Mnanie Mutua, PW8, Stella Mulwa and PW9, Damaris Mutua testimonies were similar to the effect that on the material night, they heard screams after which they went to find out what was happening. They followed the screams and found the deceased pleading for forgiveness while lying on the ground. They were able to clearly see the scene as there was moonlight and they had torches. They saw the 1st appellant wielding a catapult while the 2nd appellant wielded a rungu; the deceased had a cut wound on her left leg. The area chief arrived when the deceased had already died.

7. PW10, Muteti Mutunga testified that he was the deceased's husband and on March 24, 2012 at 6:00am he received a call from his brother, one Mulatya who informed him that his wife had been fatally injured and the body taken to Kitui Mortuary. He went to the mortuary where he confirmed the information. He observed that the deceased had a broken finger. He then went to the police station and recorded a statement whereat he was given the name of the appellants as the culprits, he only knew the 2nd Appellant.

8. PW11, Dr Patrick Mutuku a medical officer at Kitui District Hospital adduced in evidence the Post Mortem report that was filled by her colleague, Dr Jowi after conducting a post mortem on the body of the deceased on March 30, 2012. The body had a deep cut on the head which was diagonal from the left posterior area to the right one, there was a deep cut on the right knee, the artery was severed and there were multiple small cuts on the head and upper limb. The cause of death was opined as massive hemorrhage secondary to severe popliteal artery.

9. PW12, SSGT Sammy Ndegwa then attached to Kitui Police Station was the investigating officer. His evidence was that on March 24, 2012 at 7:45am the assistant chief, Kyambusya Location reported that

there was a person who had been beaten at Kaiyo River. He was accompanied to the scene by late PC Omondi. They found the body of the deceased which had a deep cut behind the knee, forehead and small finger and the cheek had blunt trauma. He gathered from the area chief that the two appellants had farms along the river and the deceased went there to steal vegetables. He recovered the murder weapons being a wooden stick and a panga that were partly hidden in the ground 15 metres from the body. He then arrested the two appellants and later charged them.

10. The appellants gave sworn statements of defence. The 1st appellant stated that the deceased was his aunt and he did not kill her. That on the material night he woke up his brother-in-law and the 2nd appellant to go and check on the farm as vegetables used to be stolen. On arrival, they saw light from torches and they raised alarm. The thieves ran in different directions and neighbors came; he later heard them say "this is one of them" after which he found a person lying on the ground whom he recognized as the deceased. He called the chief who on arrival declared the deceased dead. His defence was that he did not know who had assaulted the deceased or about the murder weapons that were recovered from the scene. He had however been showing people where the vegetables were being stolen from.

11. The 2nd appellant on his part in corroborating the 1st appellant's statement, stated that the latter woke him up so that they go and check on the vegetables. They spotted lights on the farm whereupon they raised alarm by screaming. Some people ran away while others surrounded the deceased who was lying on the ground. He stood aside as he was a stranger in the area. The 1st appellant together with another raised the area chief who on arrival declared the deceased dead. Thereafter, the police arrived. He denied assaulting the deceased and that anybody saw him assaulting her.

12. At the conclusion of the trial, the learned trial Judge found that all the elements of the offence of murder were established. The appellants were found guilty, convicted accordingly and sentenced to death. Notably, they were convicted based on the doctrine of circumstantial evidence in that, although no one saw the appellants fatally injuring the deceased, available evidence pointed to no other person other than the appellants as the only persons who could have committed the offence. The trial court also found that malice aforethought was established by the fact of the serious nature of the injuries that the deceased suffered which inferred that the appellants intended either to cause grievous harm or death of the deceased.

13. Aggrieved by both the conviction and sentence, the appellants preferred the instant appeal to this Court and by a Memorandum of Appeal dated on the April 11, 2022 they have raised 6 grounds of

    appeal which we have condensed into three, namely that; the case was not proved beyond reasonable doubt; the learned Judge erred in basing her conviction on circumstantial evidence that did not meet the required threshold and therefore not sufficient to sustain a conviction; and that their defences were not considered leading the trial court to mete out a harsh and excessive sentence.

14. The appeal was canvased by way of written submissions with limited oral highlights. Learned counsel, Mr Sajay Bansari appeared for both appellants while learned prosecution counsel, Mr Omondi appeared for the respondent.

15. On the part of the appellants, it was submitted that the burden of proof always rests with the prosecution to prove the guilt of the accused person, beyond reasonable doubt. That in this case, the prosecution failed to discharge the burden, more so because the murder weapons were not adduced in evidence which was a pointer that malice aforethought was not established. That even if the alleged murder weapons were recovered, no forensic analysis was conducted on them in an attempt to link them to the offence. They argued that, a catapult was mentioned as one of the weapons used but it was not adduced in evidence and neither was any of them arrested with the murder weapons. In this regard,

it was argued that the trial court failed to enquire into the errors and mistakes that were made by the police in the investigations as crucial evidence was not collated and produced by the prosecution.

16. Furthermore, if the appellants were guilty they would have fled the scene but in this case they did not. That had the neighbours who turned up at the scene known they were culpable, the calm that was witnessed in the village would not have obtained as the villagers would have vented their anger on them. Hinged on this fact, it was submitted that the threshold of the application of the doctrine of circumstantial evidence was not met. That indeed, many people were at the scene and so the possibility that the deceased was assaulted by a mob could not be ruled out. The evidence of the prosecution was nothing less than hearsay evidence which could not be relied on. On the whole, we were urged to find that, the prosecution did not prove their case to the required standard, and we should thus quash the conviction.

17. On sentence, it was submitted that it was harsh and excessive thus contravened the provisions of Article 26 of the *Constitution* which guarantees the right to life. However, should we be inclined to uphold the conviction, we should exercise our discretion and set aside the death penalty and substitute it with a more lenient sentence. Reliance was placed on the case of *PON V Republic* [2019]eKLR in this regard.

18. The respondent vide submissions dated November 14, 2022, submitted that the prosecution witnesses placed the appellants at the scene of the crime and there was strong circumstantial evidence unerringly pointing at the appellants as the attackers who inflicted the fatal cut wounds on the deceased. That it was clear that the appellants had planted vegetables at the river bank that used to be harvested illegally by unknown people so they decided to lay an ambush to net the thieves. On the material night they found the deceased whom they suspected to be the thief. They took the law into their hands and beat her to death. The deceased was heard crying for forgiveness from the appellants. All these facts ruled out any other hypothesis of a possibility that any other person or persons than the apppellants attacked the deceased.

19. The appellants had both mens rea and motive to harm any person they suspected was harvesting the 1st appellant's vegetables. It happened that they suspected the deceased who they had all the reason to teach a lesson; and they did so by killing her. Counsel denied that the prosecution relied on hearsay evidence as all the elements of the offence of murder as enunciated in the case of *Abanga alias Onyango v Republic* , Criminal Appeal No 32 of 1990}} were sufficiently established and we were urged to uphold the conviction.

20. The respondent made no submission on sentence.

21. We have considered the evidence adduced in the trial court, respective submissions and the law. In our view, the only issues that arise for determination are whether: the prosecution proved its case beyond reasonable doubt and whether we should interfere with the sentence.

22. The elements constituting the offence of murder under Section 203 of the *Penal Code* are; the fact of the death of the deceased and that it was the accused person who caused the death and, that the accused person had malice aforethought when he or she committed the actions that led to the death.

23. The fact of the death of the deceased is not in dispute. It was confirmed majorly by the witnesses who went to the scene upon responding to her distress call; these are PW1 to PW9. PW10 went to Kitui District Hospital and confirmed that indeed his wife was dead. The post mortem was conducted by Dr Jowi and PW11 adduced the Post Mortem report in evidence. The cause of death was established to be massive hemorrhage secondary to severed popliteal artery.

24. The next issue is whether it was the appellants who were responsible for the death of the deceased. They were convicted based on the doctrine of circumstantial evidence. The principles to be applied

for a conviction based on circumstantial evidence to stand were well spelt out in the case of *Abanga Alias Onyango V Republic*, CrA No 32 Of 1990 where it was held that circumstantial evidence must be cogent and firm, it must be definite and unerringly pointing to the guilt of the accused and that it must cumulatively form a complete chain towards the irresistible conclusion that the crime was committed only by the accused.

25. The law on circumstantial evidence was also well enuncuitaed in the case of *R v Kipkering Arap Koske* [1949] 16 EACA 135 that, in order to justify a conviction based wholly on circumstantial evidence, the inculpatory facts must not only be incompatible with the innocence of the accused, and be incapable of any explanation upon any other reasonable hypothesis than that of his guilt, but also that the said facts must exclude co-existing circumstances which may tend to weaken or destroy the inference of guilt.

26. Equally, in *Taper Vs Republic* (1952)2 All ER, 447;(1952) AC., 480, the Court stated:

> " It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

27. The learned trial Judge properly addressed her mind to the above principles. In this regard, she had the following to say:

> " 13. On the material night the Accused persons went to check on persons who were harvesting the 1st Accused's vegetables without his consent. According to the defence put up they saw some people and raised the alarm which made them run into different directions and subsequently disappeared. According to the Accuseds, the state of confused and noisy disturbance amidst darkness attracked the attention of neighbours who went to the scene.
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> 14. Witnesses who went to the scene only carried spotlights. It was not alleged that some of them carried weapons. The Accused persons on the other hand had weapons. On arrival PW1 found the 1st Accused holding a catapult while the 2nd Accused had a wooden stic. PW2 saw the 1st Accused stoning the Deceased. At that point in time the 1st Accused's mother was holding a panga begging him to leave the Deceased but he justified his act of hitting her arguing that the Deceased had harassed him for long. He refused to heed the Deceased's plea to be forgiven. PW9 saw a panga at the scene which the 1st Accused hid prior to the police arriving but it was recovered. PW12 found the panga partly hidden in the ground some 15 metres away from where the body of the Deceased lay.
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> 15. The 1st and 2nd Accused persons went to the locus in quo because vegetables were being stolen at the wee hours of the morning, when the Deceased sreamed and the neighbours answered her call of distress some of them found them in the possession of the weapons.
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> 16. Although the 1st and 2nd Accused denied vehemently having committed the act that caused the death of the Deceased, evidence adduced point unerringly at them as persons who did it. Evidence adduced did not point at any other neighbour/person who could have had the motive to injure the Deceased."

28. The appellants argued that the circumstantial evidence availed did not meet the required threshold, as the testimonies of PW4 to PW12 only confirmed the presence of the thieves and the fact of the death of

the deceased. That the trial court convicted them merely because the scene of crime was the appellants' land they were there at, at the material time. To them, fate had them at the scene as, just like other neighbours, they had responded to screams of a person in distress who happened to be the deceased.

29. In our view, although the prosecution witnesses arrived at the scene at different times, they each testified as to what they saw. In particular, PW1 and PW2 were categorical that there was moonlight and with the further aid of the appellants' torches, the scene was well lit and they clearly stated how the appellants were armed. PW1 said that the 2nd appellant had a catapult in his hands and he stood 7 metres from where the deceased lay. PW2 on his part found the 1st appellant seated on the ground holding a wooden stick and 2nd appellant stoning the deceased. This was replicated in the evidence of PW3 to PW9. None mentioned seeing any other person at the scene armed. Further, the appellants themselves conceded to coming across the thieves in their land upon which they raised alarm and other people came. It happened that, among the thieves was the deceased whom they assaulted with a view to teaching her a lesson never to steal again. To be precise, PW2 testified that:

> " Accused, Makau sat down holding a stiack . Then Salim was stoning the lady I was able to see. There was moonlight. I could see them they were approximately six(6) metres away from where I stood. The accused are my neighbours."

30. PWI had earlier testified that:

> " On arrival we found a lady lying on the ground. It was not a person I knew. There was moonlight which enabled us to see. I was some 7 metres away from where she lay hence I could see clearly Accused 1 had a catapult in his hand.
>
> Accused 2 had a club (rungu) in his hand. I could see flasing torches coming forward the same direction."

31. It suffices to say that, PW1 and PW2 were attracted to the scene by screams and when they arrived they found the deceased on the ground crying for forgiveness from the appellants. Other neighbours joined them later, which no doubt points that the persons who could have assaulted the deceased were the appellants. To dislodge the assertion that the deceased was a victim of mob justice, the time of the incident was between 3am to 6am, a time when, logically only neighbours could have responded to the distress call. And when they did, the persons found to have earlier patronized the scene were the appellants. This was echoed by PW4 and PW5 who also responded to the distress call. Thus, the neighbours together with the appellants would be able to identify any other person who was armed. To the contrary, the only persons who were found armed were the appellants.

32. To emphasize the foregoing, PW2's testimony was that the appellants' mother was begging them to stop beating the deceased to which they replied that the thieves had been stealing from them for too long. Compounded by the fact that the deceased could be heard begging for mercy and specifically from the appellants clears any doubt that the appellants had every reason to assault the deceased whom they suspected was the thief of the 1st appellant's vegetables.

33. The above chain of events no doubt points irrestibly to the fact that the appellants were at the scene of the murder and were the ones who killed the deceased. We refuse to agree with the submission that the deceased was a victim of mob justice. She was assaulted to death by the appellants.

34. The appellants further complained that the case was not proved on the ground of the failure by the prosecution to produce the murder weapons, namely the catapult and stone which the 2nd appellant was allegedly armed with and that the weapons which were produced, namely a panga and wooden

stick were not scientifically analyzed so as to link them to the offence. Our view is that it is good practice and procedure to adduce exhibits that would aid the prosecution to establish their case. Indeed, in any criminal case, if it is established that a particular weapon was used in the commission of the offence and is subsequently recovered, the prosecution would be obligated to adduce it in evidence unless for good reason which should be disclosed.

35. That said though, there is no mandatory requirement in law for a murder weapon to be produced. As a matter of fact, many a times the weapon is never recovered. Whereas it might have been important to produce the catapult and stone, it is our considered view that the failure to produce them was not fatal to the prosecution case. We say so because as noted above, it was established that it was the appellants who fatally injured the deceased. Further, it is not just the catapult and stone that were used in the fatal assault but also a panga and stick which were exhibited in court. Therefore, even without the production of the catapult and stone, the offence charged would have been established. We are nevertheless convinced by the testimonies, in particular of PW1 and PW2, that a catapult and stones were among the weapons used in the commission of the offence. Faced with a similar situation 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."

36. We respectfully agree, and find no merit in the appellants' argument pertaining to the non-production of the two murder weapons.

37. As regards malice aforethought, 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."

38. It is an established legal principle that malice aforethought can be inferred from the the circumstances leading to death of the deceased. See *Paul Muigai Ndungi vs. Republic* [2011] eKLR. In the circumstances of this case, and with tremendous respect to the appellants, after they apprehended the deceased, they should have handed her over to the authorities. They went to catch the vegetable thief while armed with dangerous weapons and thereon descended on her viciously, beating her to death. They did not heed to her pleas of mercy nor the 2nd appellant mother's plea to stop further assaulting

her. We can only imagine how painfully and brutally the deceased met her death. The only reasonable inference to be drawn is that they intended to either cause grievous harm or death of the deceased. There can never be worse malice aforethought.

39. We also find this case similar to that of *Omar v Republic*, (2010) 2 KLR, 19 at page 29, where this Court 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".

40. From a summary of what transpired before the deceased breath her last, malice aforethought was proved under Section 206 (c) of the *Penal Code* and accordingly find no merit in this ground of appeal.

41. On sentence, it is evident that at the time it was passed, death sentence was perceived to be the only lawful sentence for the offence of murder. Jurisprudence has changed since the Supreme Court decision in *Francis Karioko Muruatetu & Another vs 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 recorded only a death penalty should be imposed.

42. The appellants pleaded that they were remorseful, young with families they fend for and therefore urged for a more lenient sentence. We take into account that, other than a sentence serving objectives such as deterrence, community denunciation and rehabilitation, it should also reform the offender. Very punitive sentences do not always rehabilitate an offender; they can harden them as long incaceration creates desparation rather than hope in life. It is in these circumstances we think we should exercise our discretion to interefere with the sentence which we hereby do.

43. In the upshot, the appeal partially succeeds. We dismiss it on conviction. We however set aside the death sentence and substitute it therfor with 25 years imprisonment with effect from the date of arrest which is March 24, 2012.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

WELDON KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR