**Kathee alias Kabii v Republic (Criminal Appeal 13 of 2017)**
**[2023] KECA 1043 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KECA 1043 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NYERI**

**CRIMINAL APPEAL 13 OF 2017**

**W KARANJA, LK KIMARU & AO MUCHELULE, JJA**

**JUNE 30, 2023**

**BETWEEN**

**JAPHET KATHEE ALIAS KABII ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against the decree and judgment of the High Court at Meru (R.P.V.Wendoh,J) dated 6th December, 2016 in High Court Criminal Case No. 67 of 2012)***

## JUDGMENT

1. The appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal code* before the High Court sitting at Meru. It was alleged that he on the night of September 22, 2012 at Nthambiro village, Nguyuyu location in Igembe South District within Meru County murdered Lydia Karambu. The appellant pleaded not guilty to the charge compelling the prosecution to summon 5 witnesses to discharge the burden of proof to the required standard of beyond reasonable doubt. At the close of the prosecution case, the court found the prosecution had established a prima facie case against the appellant and, consequently, placed him on his defence. He denied having committed the offence proffering the defences of provocation and self-defense.

2. The learned Judge held that there was no evidence that the appellant was provoked or that the deceased had come home drunk as alleged, therefore, his defense of self-defense or provocation was not demonstrated. It was further held that the prosecution had proved its case beyond any reasonable doubt and that the injuries inflicted on the deceased had led to her death.

3. The learned Judge further held that malice afterthought had been established from the conduct of the appellant who had admitted hitting his wife on the neck and leaving her for dead without making any effort to assistance her. Ultimately, the appellant was found guilty as charged and was convicted and sentenced to suffer death.

4. Aggrieved by this decision, the appellant filed a notice of appeal dated December 13, 2016, raising grounds that: the learned Judge erred in law and fact by:

> "failing to note that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies; failing to note that the prosecution did not prove the ingredients of murder in particular mens rea; relying on PW2's evidence that had no basis; rejecting his defense without any cogent reason contrary to section 169(1) of the C.P.C and shifting the burden of proof from the prosecution to the defence".

5. His supplementary grounds are that the learned Judge erred in convicting for the offense of murder yet the facts and evidence constituted the offense of manslaughter; considering extraneous matters in convicting him; arriving at a wrong conclusion when evidence showed there was provocation; dismissing the appellant's defense as an afterthought yet it was corroborated by a prosecution witness and that the offense of murder was not proved.

6. This being a first appeal we are guided by the decision in *Okeno v. Republic* [1972] EA 32 and *Pandya v. Republic* [1957] EA 336 wherein the court is enjoined to re-consider the evidence, evaluate it and draw our own conclusions. We are also required to scrutinize the evidence on record to see if it supports the learned Judge's findings and conclusion and ensure that no failure of justice was occasioned; See also *Kiilu & another v. Republic* [2005]1 KLR 174.

7. The brief facts of the case are that the deceased was the appellant's wife. On the material date, they were in their house which was a few meters from her mother, Rose Nkatha, (PW1)'s house. Rose heard screams emanating from her daughter's house. She rushed there, with her son close in tow, to see what the problem was. She found the appellant who was armed with a piece of wood assaulting the deceased outside the house. The deceased had a crying baby in her arms. When Rose tried to intervene, the appellant turned to her and hit her with the wood plank on her back and below her eye causing her to flee the scene. Attempts by neighbours who arrived at the scene to rescue the deceased were thwarted by an avalanche of arrows that were shot towards their direction. The deceased fell down and one of her older children rushed to where she lay and took away the baby and fled. The deceased managed to get up and went back to the house.

8. According to the prosecution witnesses, the appellant followed the deceased into the house where he continued to assault her. The deceased's mother, and the others who had gathered at the scene left and decided to go to the Administration Police camp where they reported the matter. They were accompanied back to the scene by AP Cpl. Komen (PW4) but they did not find the deceased in the house. They looked for her around the farm and found her lying down in a miraa farm. She had many bruises all over her body. They also looked for the appellant and found him sleeping in his 2nd wife's house. He was arrested. The deceased was rushed to Maua District hospital, where she was pronounced dead on arrival.

9. The post-mortem conducted on the deceased by Dr. Njeru Charles (PW3) revealed multiple bruises on the abdomen, hands, lower limbs, chest, and upper lip and the right eye had a sub-conjunctival haemorrhage. Internally, there was a contusion on the temporal scalp, and a mass subdural hematoma on the left cerebral hemisphere. The doctor formed the opinion that the cause of death was severe head injury due to assault.

10. When placed on his defence, the appellant testified on oath and denied killing the deceased. He told the court that he had given the deceased some Kshs 8,000 to purchase household groceries, but that the deceased had come back home drunk late in the night in the company of another man. An argument ensued between him and the deceased after the said man hit him with a bottle of beer. He admitted

having hit the deceased at the back of her head and left her at the scene and went to sleep in his other house. He said he was woken up by the police and arrested and taken to the police station. On cross examination, he conceded that the deceased's mother had told the truth in regard to what had transpired.

11. We have considered the evidence adduced before the trial court in its entirety along with the submissions filed by both counsel and the relevant law.

12. From the sum total of the evidence presented in court, there is no doubt the deceased died from the injuries she sustained when she was assaulted by the appellant. The evidence on the injuries on the deceased as narrated by the witnesses was corroborated by the doctor. The appellant did not also deny having assaulted the deceased, although he tried to justify his actions. Actus reus, or the act of killing was, therefore, proved.

13. For the charge of murder to be proved, the prosecution also has to prove that the killing was accompanied by malice aforethought, or mens rea. Malice aforethought is defined in section 206 of the *Penal Code* as, inter alia,

> " 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 persons. 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;"

14. The courts have also expounded on the above definition. There is a wealth of jurisprudence in this area. For instance, in *Hyam vs. DPP* [1974] A.C the court held that:

> " the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased"

15. In *Rex vs. Tubere s/o Ochen* 1945 12 EACA 63, the predecessor of this court laid down some guidelines in regard to how malice aforethought may be proved. The court stated:

> "The duty of the court in determining whether malice aforethought has been established is to consider the nature of the weapon used, the manner in which it is used, the part of the body injured, the conduct of the accused before, during and after the attack".

16. The Prosecution had the burden to prove that the appellant had the intention to cause the death of or grievous harm to the deceased; that he had the knowledge that his act or omission would probably cause the death of the deceased or he did not care whether such acts could lead to the death of the deceased. The nature of the injuries causing death, the gravity of the same and the weapon used are good indicators as to the appellant's intention.

17. From the evidence on record, the appellant was armed with a stick and a wooden plank, which he used to severally hit the deceased. We note that from the nature of the injuries, particularly on the head, the appellant had used excessive force when he assaulted the deceased. From the post mortem form, the deceased had a contusion on her skull and a haematoma, injuries that must have been caused by excessive force on her head by the wooden plank.

18. When a person hits another on the head with so much force, clearly if the intent to kill was not clearly manifest, the intention to cause grievous harm, or not caring whether the victim would survive such blows or not amounts to malice aforethought.

19. Also, as observed by the learned trial Judge, the appellant chased away and even attacked his mother-in-law when the latter tried to intervene. Other neighbours who tried to intervene were also repulsed. The appellant did not care whether the deceased needed medical attention and instead left her badly injured and helpless in a miraa farm. That ,in our view, was a clear demonstration that the appellant intended to cause grievous harm to the deceased, if not altogether kill her.

20. This was a clear case of aggravated gender-based violence (GBV) whose end result the appellant was least bothered. Based on the reasons we have given above, we are satisfied that malice aforethought was proved to the required standard.

21. Learned counsel for the appellant urged that the appellant's evidence of self-defense and provocation was not considered and that his evidence had been collaborated by Sgt. Saad Mohamed (PW5), the investigating officer who had drawn the sketch map of the scene as he had found it and also recorded statements. We have perused the evidence proffered by the appellant before the trial court. He appeared to be saying that he was provoked by the deceased because she came home late and drunk on the material night and instead of bringing the groceries she had showed up with a man who was carrying a bottle of beer with which he is said to have hit the appellant, provoking a fight. He did not, however, say what happened to the alleged intruder who was invisible to everyone else who appeared at the scene as the fight was going on. He said that he just went to sleep and was only woken up later by the police and the deceased's mother. On cross-examination, the appellant confirmed that he had hit his wife on the back and neck with a stick. The germane issue for our determination is whether the facts, or circumstances put forth by the appellant were extenuating circumstances that could lessen the gravity of the offence and reduce the charge to manslaughter.

22. The test in respect of the defence of provocation varies from case to case. Addressing this issue in *Wero v. Republic* (1983) KLR 549 this Court held that:

> "where a person accused of killing another raises the defence of provocation, it is a question of fact whether the accused, in all the circumstances of the particular case, was acting in the heat of passion caused by grave and sudden provocation when he killed that person.."

23. In the instant case, the appellant's evidence was that the deceased came home at night drunk. When he opened the door for her, he was hit by a bottle by a man who was with his wife. Instead of fighting the intruder, if indeed there was one, he decided to assault the deceased. As stated earlier, nobody else seems to have seen such a man, and his existence remains a figment of the appellant's imagination. Further, as aptly noted by the learned trial Judge, there was no threat posed by the deceased who was unarmed and, therefore, the appellant's action of viciously beating the deceased was uncalled for. We note further, that when the deceased's mother went to rescue her, the appellant attacked her, an act that is repugnant in African culture.

24. The appellant also repulsed other neighbours who tried to approach the scene.

25. The sum total of the facts and circumstances surrounding this appeal do not accord the appellant the defence of provocation. The fact of a wife coming home drunk at whatever time of the night cannot amount to provocation. The position also obtains in respect of a habitual drunk husband. The evidence before the court does not disclose a scintilla of evidence of self -defence, and there is nothing for us to consider in that regard. We find the charge of murder was proved beyond all reasonable doubt. The appellant was properly found guilty and convicted as charged of murder.

26. The appeal against conviction is totally devoid of merit and is hereby dismissed.

27. In regard to the sentence, the appellant was sentenced to death which was then the only prescribed sentence at the time. He is therefore entitled to a review of his sentence so that he can benefit from the jurisprudential paradigm shift occasioned by the Supreme Court decision in *Francis Karioko Muruatetu and Others v. Republic* (2017) eKLR where the Supreme Court, while not outlawing the death sentence, pronounced that it was not the only sentence that could be meted out for the offence of murder. Having considered the appellant's mitigation given before the trial court, the gravity of the offence and the fact that the deceased lost her life following senseless acts of gender- based violence, we set aside the death sentence and substitute therefor a sentence of 30 years imprisonment from the date of conviction. In arriving at this sentence, we have taken into account the period that the appellant spent in remand custody prior to his conviction.

**DATED AND DELIVERED THIS 30TH DAY OF JUNE, 2023.**

**W. KARANJA**

**.....**

**JUDGE OF APPEAL.**

**L. KIMARU**

**.....**

**JUDGE OF APPEAL.**

**A. O. MUCHELULE**

**.....**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**