Ayora v Republic (Criminal Appeal 145 of 2015)
[2023] KECA 787 (KLR) (23 June 2023) (Judgment)

Neutral citation: [2023] KECA 787 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 145 OF 2015

PO KIAGE, J MOHAMMED & M NGUGI, JJA

JUNE 23, 2023

BETWEEN

JOSEPH OTIENO AYORA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisii, (Sitati, J.) dated 5th June, 2014 in HCCRC NO. 13 OF 2007)

JUDGMENT

1. This appeal arises from the judgment of the High Court (Sitati, J.) in High Court Criminal Case No 13 of 2007. Joseph Otieno Ayora (the appellant) was charged and convicted of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The information against him stated that on December 16, 2006 at Uriri Division in Migori District within Nyanza Province, he murdered Edward Kwaka Okiro (the deceased).

2. The prosecution called six (6) witnesses in support of its case.According to Brian Otieno, (PW1), on December 16, 2006 at around 6:30am, he, the deceased, his sister Agatha, and his cousin George (the appellant's son) were walking to the bus stop with the intent of visiting their grandmother in Rachuonyo when the appellant rode past them on a bicycle, stopped in front of them and asked George where they were going. The appellant then removed a knife from his pocket and chased George who ran away. The appellant then turned on the deceased and stabbed him on the left side of the chest causing the deceased to fall down. In cross- examination, PW1 testified that upon stabbing the deceased, the appellant took the knife, licked it and ran away.

3. Mary Akinyi Ochieng, (PW2) the deceased's sister in-law, testified that she rushed to the scene after being informed of the incident by PW1 and found the deceased bleeding from the chest. With the help

of one Elisha (who was not called as a witness) they rushed the deceased to Ombo Mission Hospital where he was pronounced dead on arrival.

4. Sgt. Abel Ombok (PW3) testified that on the material day, he received a report from PW2 that the deceased had been stabbed by a person well known to him and that he had succumbed to his injuries. Acting on information received from members of the public, PW3 later arrested the appellant while he was pushing his bicycle up a hill. PW3 testified that together with the appellant, they proceeded to the appellant's house where the appellant led them to his bedroom and removed a knife from his coat which was hanging on the bedroom wall. In cross-examination, PW3 testified that the knife recovered from the appellant's house was blood stained.

5. John Ouma Manyala, (PW4) the Chief of South East Kanyamkago location, testified that he had known the appellant for over 20 years. It was his testimony that the appellant was arrested and that he accompanied the police officers and proceeded to the appellant's home where he saw the knife which was alleged to have stabbed the deceased and which he identified in court.

6. Constable Francis Opondo, (PW5) testified that he accompanied the Officer Commanding Station (OCS), Chief Inspector Baraza, to Awendo Police Station where they arrested the appellant, carried the knife and proceeded to Migori Police Station.

7. A post mortem examination was performed on the body of the deceased by Dr. P.M. Ajuoga (Dr. Ajuoga). It was his evidence that the body of the deceased had a deep pierced wound on the left side of the chest on the epicardial region. There was another pierced wound on the upper lobe of the left lung and a pierced wound on the left ventricle of the heart. Dr. Ajuoga formed the opinion that the cause of death was anaemia due to a ruptured heart and ruptured left lung. It was his opinion that the wounds could have been caused by a sharp instrument.

8. When placed on his defence, the appellant gave unsworn testimony and called no witnesses. He denied the charge and stated that on the morning of December 16, 2006, he went to work in his shamba (farm) and went back home at around 8:30am. He then proceeded to Awendo town to buy some wares. He stated that he left Awondo town at about 11:30am but before he reached Uriri Township he was arrested and escorted to the Administration Police (AP) Camp at Uriri. He stated further that he was subsequently taken to his home on allegation that he had killed somebody. He stated that he took his plea after 74 days on February 28, 2007. He challenged the evidence of PW1 by stating that PW1 had a grudge against him and had threatened his life. He questioned why PW1 did not raise alarm when the incident occurred. He challenged PW5's search of his house without a warrant. He also queried whether the name of the deceased was Edward Otieno or Edward Kwaka.

9. Upon analyzing the evidence before the court, the learned Judge in her determination noted that the evidence of PW1 weighed against the backdrop of the appellant's defence remained unshaken throughout the trial. The learned Judge was satisfied that there was no mistaken identity regarding the person who stabbed the deceased and stated as follows:

> " I am aware of the fact that the only eye witness in this case is PW1 and because of that I must treat the evidence of PW1 with caution. I saw this witness testify. I observed his demeanour and he appeared very truthful, firm and calm. In any event, the accused was well known to PW1."
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> The learned Judge found that the prosecution had proved its case beyond any reasonable doubt and consequently found the appellant guilty of murder and sentenced him to death.

10. Dissatisfied with that decision, the appellant filed the instant appeal in which he raised three (3) grounds to wit that the learned Judge erred: in concluding that the required standard of proof was met to sustain a conviction as *mens rea* was absent; in affirming the appellant's conviction without taking into account that the appellant was in police custody for more than three months after his arrest; and in sentencing the appellant to death without considering other forms of punishment.

11. The appeal was heard by way of written submissions with oral highlighting. Learned counsel for the appellant, Mr. Kouko Cecil Wilson, relied on section 206 of the *Penal Code* and this Court's decisions in the cases of *Joseph Kimani Njau v Republic* [2014] eKLR and *Peter Kiambi Muriuki v Republic* [2013] eKLR to assert the point that the circumstances explained by PW1 did not bring out the motive for murder. That in the absence of malice aforethought, the unlawful killing is manslaughter as the prosecution failed to establish this key ingredient of the offence of murder beyond reasonable doubt.

12. Counsel further submitted that the delay of over six (6) months before the appellant was arraigned in court was not explained. He noted that the appellant was arrested on December 29, 2006 and arraigned in court on June 20, 2007, and his rights were therefore infringed. Further, that in light of the decision of *Francis Karioko Muruatetu v Republic* [2017] eKLR and the fact that the appellant had not been convicted of any prior offences, the death sentence should be set aside and substituted with a reduced sentence. Counsel further urged that the Court should find that the evidence adduced by the prosecution proved the offence of manslaughter not murder. Further, counsel urged that the court do find that the appellant has been in custody for 15 years and release him. Counsel urged the Court to quash the conviction and set aside the death sentence imposed on the appellant.

13. Learned counsel for the respondent, Mr. Ligami Shitsama opposed the appeal and submitted that the prosecution established malice aforethought when they proved the extent of injuries sustained by the deceased as confirmed by Dr. Ajuoga. Counsel asserted that the appellant had the knife which PW1 established was used to stab the deceased and that by walking around with a knife, the appellant clearly had the intention to kill. Counsel argued that the identity of the appellant was not questionable as PW1 identified the appellant by recognition and saw the appellant remove the knife with which he stabbed the deceased.

14. Counsel maintained that the prosecution had discharged its burden of proof beyond any reasonable doubt to warrant the appellant's conviction for murder. Counsel emphasized that the evidence of PW1 as corroborated by the post mortem report showed intent and that by licking the knife before running away showed that the appellant was indifferent and without remorse for murdering the deceased. Counsel took issue with the fact that the appellant was walking around with a sharp double-edged knife and concluded that the ingredients for the offence of murder had been established.

15. Relying on the case of *Stanley Kamairo Ethangatha v Republic* [2010] eKLR, counsel conceded that the appellant's rights may have been infringed by being held in custody for a long time before arraignment but the reason for the delay was not on record. Counsel emphasized that the appellant was represented by counsel and as such should have raised the issue before the High Court for determination. Counsel submitted that if the alleged breach did exist, it did not exonerate the appellant of the offence for which he was charged, convicted and sentenced.

16. On the sentence meted out on the appellant, counsel submitted that the appellant had not presented any evidence to prove that he had reformed or was remorseful or give reasons why he should benefit from a reduced sentence. Counsel urged that if the Court was inclined to reduce the sentence, the appellant be sentenced to 40 years' imprisonment.

17. This being a first appeal, this Court is obligated to re-evaluate and analyze the facts and evidence that resulted in the decision in the High Court and then arrive at its own decision. In *Okeno v R*, [1972] E.A. 32 the Court stated thus:

> " 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 conclusion (*Shantitlal M Ruwala v R*, [1957] EA 57). 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 courts' findings and conclusions; it must make its own findings and draw its own conclusion 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 witness."

18. We have carefully analyzed the record, the submissions by counsel, the authorities cited and the law. The issues that arise for determination are whether the offence of murder was proved beyond reasonable doubt as to sustain a conviction, and if so, whether the appellant's sentence should be reduced; and whether the appellant's constitutional rights were violated by the delay in arraignment.

19. The appellant was charged and convicted of the offence of murder.

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."

20. It is trite that for the prosecution to sustain a conviction on the charge of murder, there must be proof that the death of the deceased occurred; that the death was caused by the appellant and that the appellant had the required malice aforethought. These three essential ingredients must be proved beyond any reasonable doubt. The essential ingredients of murder were outlined in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR as follows:

> " ...that the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased; and that the accused had malice aforethought."

See also *Joseph Kimani Njau v Republic* [2014] eKLR.

21. There is no dispute that the deceased died. PW1 testified that he saw the appellant stab the deceased while PW2 accompanied the deceased to hospital where he was pronounced dead on arrival. The post mortem report conducted by Dr. Ajuoga showed that the deceased had died as a result of anaemia due to ruptured heart and left lung inflicted by a sharp object.

22. The issue of identification did not arise but it is worth noting that the appellant was placed at the scene of crime by PW1 and was later arrested while pushing the bicycle he had at the time of the incident and the chain of events from the attack to his arrest was not broken. The appellant was well known to PW1, PW2 and PW3 and the stabbing happened in broad daylight. The evidence tendered by PW1 as corroborated by the other witnesses directly linked the appellant to the offence.

23. As regards whether malice aforethought was established, this Court has in the case *Republic v Tubere s/ o Ochen* [1945] 12 EACA 63 acknowledged that in determining whether malice aforethought has been established the following elements should be considered:

> " 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."

24. From the post mortem report it was evident that the deceased died as a result of a stab wound. From the eye witness evidence of PW1, the deceased was stabbed on the chest which is consistent with the medical report that the deceased died of anaemia due to a ruptured heart and left lung. There was evidence of recognition by PW1 who was an identifying witness and who identified in court the knife that he saw the appellant stab the deceased with. PW3 testified that he arrested the appellant who took him and other officers to his home where the knife that was allegedly used to stab the deceased was retrieved. The medical evidence of Dr. Ajuoga indicated that a sharp instrument could have caused the wounds on the lung and heart. We are satisfied that actus reus was proved through the evidence adduced by the prosecution. From the circumstances, we are satisfied that the appellant was responsible for the death of the deceased.

25. Did the prosecution, by the evidence of the 6 witnesses prove that the appellant had malice aforethought when he struck the fatal stab? On malice aforethought, section 206 of the same *Code* 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;
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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 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." [Emphasis supplied].

26. Malice aforethought was succinctly discussed by this Court in *Nzuki v R* [1993] KLR 171 in the following terms:

> " 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 his acts, and commits these 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 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. 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 a crime of murder. (see *Hyman v Director of Public Prosecutions*, [1975] AC 55."

In this case, we must ask ourselves whether there was sufficient evidence on record to establish that the appellant intended to cause the death of the deceased, or cause him grievous bodily harm. Admittedly, none of the witnesses witnessed the actual blow landing on the deceased's head. Nobody could tell the circumstances that preceded the scuffle between the two. The Court can only surmise or make its own logical deductions as to what happened. This however cannot be done in the abstract. Other relevant factors must come into play. [Emphasis supplied].

27. In the instant appeal, a pertinent question is whether there was sufficient evidence on record to establish that the appellant intended to cause the death of the deceased or cause him grievous harm. In the case of *Bonaya Tutut Ipu & Another v R*, [2015] eKLR this Court cited with approval the persuasive authority of the Ugandan Court of Appeal case of *Chesakit v UG*, Criminal Appeal 95 of 2004 where that Court held: -

> " In determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person."
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> The court also drew inspiration from a decision of the predecessor of this Court in *Rex v Tuper S/O Ocher* [1945] 12 EACA 63 wherein, it was ruled:
>
> "It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick..."

28. This Court has in the case of *Republic v Tubere s/o Ochen* [1945] 12 EACA 63 acknowledged that in determining whether malice aforethought has been established the following elements should be considered:

> " 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."

29. From the post mortem report it was evident that the deceased died as a result of a stab wound. The deceased was stabbed on the chest which is consistent with the medical report that the deceased died of anaemia due to a raptured heart and left lung. Pw1 testified that after stabbing the deceased, that the appellant licked the blood- stained knife before he ran away. The said knife was found in the

appellant's house upon his arrest. It is also noted that the appellant was moving around with the knife and chased his son with it but when he failed to catch him, he turned on the deceased and stabbed him. In stabbing the deceased, the appellant ought to have known that his actions would cause him death or grievous harm. The evidence adduced was sufficient to establish malice aforethought. We are therefore satisfied that all the ingredients of murder were established in this case and the prosecution case was proved beyond any reasonable doubt. The upshot of our findings is that the appellant's appeal against conviction is hereby dismissed.

30. As regards the death sentence imposed by the trial Court, we note that the Supreme Court decision in *Francis Karioko Muruatetu case* did not outlaw the death sentence but rather declared the mandatory nature of the death sentence unconstitutional. The Supreme Court took the view, further, that the trial court should take into account the circumstances of the offender and the offence in meting out sentence. In the present case, the appellant committed a heinous and unprovoked offence against a defenceless person, in the presence of the deceased's son. The appellant mercilessly stabbed the deceased in the heart and lungs both of which are delicate and vital organs.

31. In mitigation in the High Court, the appellant through his counsel stated that he has 14 children and two wives and prayed for leniency. The appellant was said to be a first offender. We also consider the time spent by the appellant in custody before the trial began which was estimated to be 6 months. The prosecution conceded to this delay in the appellant's arraignment. We are satisfied that in the circumstances of this case, the appellant merits a custodial sentence.

32. In the circumstances we allow the appeal against the death penalty imposed on him by the trial court and substitute therefor a term of imprisonment of 20 years, the same to run from the date of conviction.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF JUNE, 2023.

P.O. KIAGE

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR