**Wambugu v Republic (Criminal Appeal 118 of 2020)**
**[2023] KECA 764 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KECA 764 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CRIMINAL APPEAL 118 OF 2020**

**MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA**

**JUNE 22, 2023**

**BETWEEN**

**FRANCIS MBOGO WAMBUGU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against the Judgment of the High Court at Nairobi delivered on 20th November, 2018 (Wakiaga, J.) in HCCR No. 89 of 2013)***

## JUDGMENT

1. This is a first appeal from the judgment of the High Court, where the appellant was charged with the offence of murder contrary to section 203, as read with section 204 of the *Penal Code*. The particulars were that on 20th April 2005 at Bahati Estate Area, within Nairobi County, the appellant murdered Jadiel Wambugu Mbogo, (the deceased).

2. The appellant pleaded not guilty, and the prosecution called 7 witnesses. The appellant was placed on his defence and gave an unsworn statement. Upon considering the evidence, the High Court convicted the appellant for the offence and sentenced him to death as by law prescribed.

3. Aggrieved by the decision, the appellant has lodged this appeal, where the grounds in a Supplementary memorandum of appeal were that; the trial judge was in error when he failed to find; that key ingredients of the offence of murder were not established to the requisite threshold; and that the learned judge misapplied the law by imposing the mandatory death sentence.

4. The appellant was aggrieved by the decision of the High Court and filed an appeal to this Court on grounds that; the learned judge failed to consider that prosecution did not prove motive of the murder and also failed to consider his account of what transpired on that fateful day as the deceased was his son; failed to analyze and re-evaluate the whole trial record and observe that, key prosecution witness evidence was tainted by inconsistence and was contradicted by evidence adduced by other

prosecution witnesses, thus incredible, and impinging on reliability of the verdict; failed to consider his comprehensive mitigating factors; and failed to adhere to the guidelines as set out by the Supreme Court in the *Francis Muruatetu Karoko Muruatetu & Another v Republic* (2017) eKLR (Muruatetu case).

5. Both the appellant and the respondent filed written submissions. When the appeal came up for hearing, learned counsel, Ms. Mukobi holding brief for Mr Wachira appeared for the appellant. In briefly highlighting the submissions, counsel identified two issues for determination, one, whether the offence of murder was proved beyond a reasonable doubt, and, two, whether malice aforethought was established under section 206. Counsel further submitted that the appellant did not have any motive to kill towards his son. They had good relations. Deceased body was found in the appellant's freezer. But no direct evidence was produced by the prosecution to show that the appellant murdered the deceased; that the prosecution relied on circumstantial evidence, but as to whether the threshold requirements of the circumstantial evidence could result in a conviction, counsel submitted that the evidence did not conclusively connect the appellant to the murder of the deceased.

6. In so far as the second issue was concerned, counsel contended that the sentence of death by the High Court was unconstitutional.

7. Learned prosecution counsel for the State, Ms. Ngalyuka also highlighted the respondent's submissions. Counsel opposed the appeal and submitted that the deceased's death was proved by circumstantial evidence and that the circumstances irresistibly pointed to the unlawful killing of the child; that the deceased was the appellant's child aged 10 years. He was found dead and his body dismembered; that the post mortem report by Dr. Ndegwa and the circumstances under which the deceased died pointed to the appellant as being the perpetrator to the exclusion of any other person.

8. On sentencing, counsel submitted that the court applied the proportionality test and concluded that the offence that was committed in the most brutal manner, was premeditated, cold blooded and in breach of trust of the appellant's parental responsibilities to his young son, the deceased; that the trial court was alive to the findings in the *Muruatetu Case*; that the death penalty is lawful and is still applicable as a discretionary maximum punishment.

9. We have considered the grounds of appeal and the submissions. This is a first appeal, and the duty of this Court as a first appellate court has been variously spelt out. In the case of *Kiilu & Another v Republic* (2005) 1 KLR 174, this Court stated;

> "An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh 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 the first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower court's findings and conclusion. Only then it can decide whether the magistrate should be supported and in doing so it must make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".

10. In view of this directive, we consider the issues to be determined are whether:

    i. The prosecution proved its case to the required standards; and

    ii. The death sentence imposed on the appellant was lawful.

11. So as to determine the issues raised, it is essential to set out the facts that were before the trial court.

12. Julian Nyambura Kamau, PW1 (Julian), stated that on 1st April 2005 the deceased's mother, who was her aunt requested to stay with her, together with the deceased, at Mlango Kubwa Estate since she was having marital problems with the appellant and had moved out of her house, to which Julian agreed. The deceased and his mother stayed with her for 2 weeks until 17th April 2005 when they both went to her rural home in Gatanga where the appellant was visiting to try and resolve their matrimonial disputes. On 20th April 2005, the appellant visited her house and stated that he wanted to see his wife. When she told him that the deceased was not staying there, he demanded for her clothes which PW1 gave him in a suitcase; that was the first time the appellant visited her house. He was very angry and kept calling his wife's name.

13. Julian further stated that when she told the appellant that his wife was no longer staying with her, he stated in Kikuyu language, that he wanted her or he was going to hurt a member of the family since he was a *mafia*. He then proceeded to damage some of Julian's belongings. On 22nd April 2005, the appellant again returned to her house and damaged a window pane while calling the name of his wife. She reported this incidence to Pangani Police Station vide OB No. 25/22/4/05. She did not hear from the appellant again until 23rd April 2005 when she was told that the appellant had killed the deceased in Bahati. She proceeded to the scene where there was a big crowd who wanted to lynch the appellant, who by then, had been arrested by the police at the scene, where pieces of the body of the deceased were also recovered.

14. Under cross-examination, she stated that the appellant had been married to her aunt for ten (10) years, and that she used to hear that the appellant was a very violent person who would beat his wife. It was her evidence that the last time she was with the deceased was on 14th April 2005. She also stated that she was not aware of any dispute between the appellant and his wife over the paternity of the deceased, but the appellant used to say that the deceased could not call another man his father, because he was his son.

15. Michael Macharia, PW2 (Michael), passed by the appellant's house on 23rdApril 2005 at 12.30 p.m. He noticed a foul smell was emanating from the house and decided to report it to the Chief. Before reaching the Chief's camp, he met some ladies accompanied by the deceased's wife who told him that the appellant was digging a hole to bury the deceased. He proceeded to the scene with the Chief and three AP officers, where they found the appellant's father in the compound who told them that the appellant was away at the Shopping Centre. But the Chief broke the door, and they found the appellant cleaning up a mess on the floor with a towel and there were pieces of the body in the freezer. When they asked him what had happened, he said he had killed the deceased because he was under stress; that his wife had been confused by, and was introduced to bad habits by a lady called Beth; that this had led him to kill the child whose body he had cut into pieces using a panga.

16. In cross-examination, he stated that they noted the appellant cleaning the floor before he saw them, and that the appellant told him that he killed the child and put him in the freezer, then later took out the body and cut it into pieces. He later sold the freezer to someone else.

17. Nahason Opiyo, PW3, the then area Senior Chief corroborated Michael's evidence. On 26th April 2005, he received intelligence information that there was a dead body in the appellant's house. He proceeded to the scene with AP officers where they found the appellant semi-naked with a cloth in his hand. His body was wet with stains from the deceased's body. When asked what had happened, he told him that he had killed the child by hitting him on the head with an iron bar, and blamed the devil. The Chief stated that in the house there was a basin, a blood stained panga, a wrapped bed sheet and a polythene bag. There were pieces of meat and bones and blood stains on the floor. They called the police who came with scenes of crime personnel. When they searched the house, they found files in respect of the appellant's case at Makadara and arrested him. The scene of crime personnel opened the

wrapped bed sheet which had parts of human flesh and the deceased's skull. There was also a yellow polythene bag with internal organs.

18. On cross examination, he stated that the compound had a strong odour, since the deceased had been dead for three days.

19. Mary Mukonyo Ndungu, PW5, a sister to the deceased's mother, Lydia Wanjiku (Lydia), stated that Lydia had requested her to accompany her to their rural home to meet with the appellant. They went together with her two children and the deceased. But the talks did not take place as the appellant did not turn up with his parents. They agreed that the deceased would be left at PW5's house since he was an age mate of one of her children. On 19th April 2005, the appellant went to PW5's house and left with the deceased in his motor vehicle. She called the deceased's mother and informed her that the child had been taken by the appellant. After about thirty to forty minutes, Lydia confirmed to PW5 that the appellant had arrived at her house with the deceased, but she declined to open for them, so he went away with the child. That was the last time the child was seen alive, until she was informed that the appellant had killed him. It was her evidence that the appellant had a good relationship with the deceased.

20. Cpl. Wilson Tenai, PW6, retrieved the original police file and confirmed that the exhibits produced in the original trial were reproduced by counsel for the prosecution. He confirmed having not conducted any investigations in the matter, but only took the appellant for mental assessment, where it was confirmed that he was fit to stand trial.

21. On 3rd May 2005, Dr. Peter Muriuki Ndegwa, PW4, conducted post mortem examination on the body of the deceased which had been dismembered into a total of twenty-nine (29) small pieces. He formed an opinion that the cause of death was dismembering by a sharp object. In cross-examination, he stated that he did not know whether the body was dismembered after or at the time of death.

22. Dr. John Maina Mburu, PW7, produced a mental assessment report on the appellant prepared by Dr. J. W. Kamunge and certified by Dr. Jumba as a true copy that confirmed that the appellant was in a stable mental condition.

23. When placed on his defence, the appellant gave an unsworn statement, that on 9th April 2005, he left his wife and child at home and when he returned on 19thApril 2005, he found that items in the house had been taken away. He then heard people entering his house from the front door while he was in the backyard door. They removed something wrapped in a bed sheet. When they asked him what it was, he told them that he had gone on a safari and had just returned. They then told him that a child had been killed in the area, and he replied that he had left the child with his mother before he was arrested and charged.

24. Turning to the issue of whether the offence of murder was established, the burden rests on the prosecution to establish three prerequisites. First, the death of the deceased and its cause must be established; secondly, that the death of the deceased was caused by an unlawful act or omission by the accused; and finally, that the accused committed the unlawful act or omission with malice aforethought.

25. With respect to whether the deceased died, all the prosecution witnesses testified that the deceased died. The child's dismembered body was found in the appellant's house. In addition, PW4 who conducted post mortem examination on the body of the deceased stated that it was dismembered into a total of twenty-nine (29) small pieces and he formed the opinion that the cause of death was dismembering by a sharp object.

26. On the next requirement which was whether the appellant was responsible for the deceased's death, the trial court stated;

> " On whether that said death was caused by unlawful act of the omission or commission on the part of the accused, the evidence on record is that the accused person was the last person to have been seen with the deceased alive. On 19th of April 2005 he proceeded with the deceased according to the evidence of PW2 to the place where his wife and the mother of the deceased was staying who confirmed that the accused had reached her place with the deceased but she did not open for them. The next time the accused was seen was when PW2 and PW3 went to his house where the body believed to be that of the deceased was found cut into small pieces and he "confessed" to the two witnesses having killed the deceased.
>
> This therefore brought the case within the scope of the doctrine of "last seen" which placed a statutory burden upon the accused to discharge a rebuttal presumption that having been the last person with the deceased before he died, he should explain how he died as stated in section 111 (1) and 119 of the *Evidence Act*..."

27. The High Court's summation of the facts of the case undisputedly point to the appellant as having been responsible for the murder of the deceased. Our re-examination of the evidence points to the appellant as having been the last person to have been seen with the deceased. PW5 confirmed that the appellant took the deceased from her house where the deceased's mother had left him. He was taken to the appellant's house on 22nd April 2005. The deceased's body was later found in his house on 25th April 2005.

Section 111 of the *Evidence Act* provides;

> " (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:
>
> > Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:
> >
> > Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

28. In other words, the onus was on the appellant to explain how the dismembered body of his son came to be in his house, which explanation was squarely within his knowledge. In seeking to explain the deceased's death in his defence, the appellant stated that he had heard that a child had been murdered. But from his defence it is apparent that he failed to provide any explanation of how the dead body of the deceased was found in his house.

29. Furthermore, when Michael and the Chief entered his house, they found him in the house cleaning up blood and flesh from the floor with a rag. They both stated that the house smelt of rotting flesh,

and upon searching the house, body parts were retrieved from a sheet under the bed, while other parts were splattered around the house. The deceased internal organs were found in a yellow polythene bag.

30. Our re-evaluation of the evidence leads us to conclude that the inculpatory facts are incompatible with the innocence of the appellant, and are incapable of explanation upon any hypothesis other than that of his guilt. As such, learned judge cannot be faulted for reaching the conclusion that the appellant was responsible for murdering the deceased, and similarly, we too have reached the same conclusion.

31. Turning to whether malice aforethought was proved, section 206 of the *Penal Code* efines malice aforethought as:

> " 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."

32. In order to establish malice aforethought, the predecessor of this Court, the East African Court of Appeal, in the case of *Rex v Tubere s/o Ochen*{1945} 1Z EACA 63,explained;

> " In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured."

And in the case of *Hyam v DPP* {1974} AC the Court further stated;

> " Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm."

33. The evidence shows that the body of the deceased was found in the appellant's house. According to the post-mortem report, it was dismembered into 29 pieces. PW 4 formed the opinion that the cause of death was dismembering by a sharp object. By killing of the child, and cutting up his body, it is clear that the appellant intended to cause the death of or grievous harm to the deceased. In dismembering the deceased's body, the appellant had every intention to kill him, and we so find.

34. In view of the foregoing, we find that the prosecution proved all the ingredients of the offence of murder to the required standard, and the learned judge was right in so finding.

35. In the circumstances, we dismiss the appeal against conviction.

36. With respect to the appeal against sentence, the appellant argues with reference to the case of *Francis Karioko Muruatetu* (*supra*) that the

> "...Judge sentenced the Appellant herein to death as provided under section 204 of the *Penal Code* which provision of law was subsequently declared by the Supreme Court of Kenya by way of a judgment dated 14th December 2017 to be unconstitutional."

37. At this juncture, it is important to point out that, we have said time without number that the Supreme Court's decision did not declare the death sentence to be unconstitutional. The Supreme Court was unequivocal that;

> "The mandatory nature of the death sentence as provided for under section 204 of the *Penal Code* is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26 (3) of the *Constitution*."

38. So that, the death sentence remains constitutional, and it is only the mandatory imposition that was rendered unconstitutional. In a ruling dated 27th March 2019, the appellant was provided an opportunity to mitigate, and through his counsel, Mr. R.T. Aswani, he informed the court that though he was involved with the death of the deceased, he was a first offender having been raised in a humble family in Bahati; that he was remorseful and the court should find him worth being re-integrated into the society and starting a new life. It was also submitted that, whilst in custody, the appellant had engaged himself in various activities, including a member of "*Crime Si Poa*"and block solving disputes. He was an official of the Kamiti Maximum Prison football team.

39. After also taking into consideration the appellant's mitigation, and that the deceased's death was a cold-blooded murder by a father of a son who loved and trusted him, and reports that the appellant had continued to threaten and persecute his wife, the mother of the deceased, the court sentenced the appellant to death.

40. Since the death sentence is constitutional, and the trial court having complied with the requisite sentencing requirements, we also dismiss the appeal against sentence.

41. In sum, the appeal is unmerited and is dismissed in its entirety.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.**

**ASIKE-MAKHANDIA**

**.....**

**JUDGE OF APPEAL**

**A.K. MURGOR**

**.....**

**JUDGE OF APPEAL**

**G.W. NGENYE**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

*signed*

**DEPUTY REGISTRAR**