



**Baibaya & another v Republic (Criminal Appeal 137 of 2020)
[2023] KECA 726 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KECA 726 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 137 OF 2020
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
JUNE 9, 2023**

BETWEEN

DOUGLAS MUTIGA MURIUKI 1ST APPELLANT

STEPHEN MURIUKI BAIBAYA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (A.A. Ong'injo, J.) dated 30th July 2020) in Criminal Appeal No. 11 of 2016)

JUDGMENT

1. On July 30, 2020 the appellants Douglas Mutiga Muriuki and Stephen Muriuki Baibaya (hereinafter referred to as the 1st and 2nd appellants, respectively) were convicted by the High Court (Ong'injo, J) of the murder of Peter Mutheu M'ithali (the deceased) under section 203 as read with section 204 of the [Penal Code](#). On September 30, 2020 they were each sentenced to 20 years' imprisonment.
2. The appellants were aggrieved by the conviction and sentence and appealed to this Court. Their grounds in the petition of appeal were as follows:-
 - ' 1) The learned judge relied purely on circumstantial evidence which was unsafe to sustain a conviction.
 2. The learned judge relied purely on uncorroborated evidence of prosecution witnesses and hence arrived at a wrong decision.
 3. The learned judge erred in law and in fact by basing conviction on only police officers without civilian witnesses despite the fact that they recorded witness statements.



4. The learned judge erred in law and fact and ignored the law in respect of dying declarations.
5. The learned judge erred in law and in fact by arriving at a conclusion that the prosecution had proved their case on the required standard, when the contrary is true.
6. That in all round circumstances, the conviction was unsafe and sentence excessive.'

They asked that the appeal be allowed, the conviction quashed and the sentence set aside.

3. On appeal, the appellants were represented by Mr Elias Mutuma while Ms Nandwa represented the State. Each filed written submissions. Mr Elias Mutuma addressed us at length while highlighting his submissions. Ms Nandwa relied wholly on her submissions.
4. Our mandate is to re-appraise and re-evaluate the evidence that was tendered before the learned Judge and come to our own independent findings, while remembering that the High Court had the advantage of seeing and hearing the witnesses as they testified (See: [Philip Nzaka Watu -v- Republic \[2016\]eKLR](#)).
5. According to the record, the prosecution called PW 2 Alfred Gitonga Munji of Tigania East Sub County, PW 3 Joshua Ngarisha Assistant Chief of Taringui Sublocation, PW 4 Corporal Ngunga Julius of Matabithi AP Post and PW 5 Corporal Osman Abdi then of Muthara Police Patrol Base. PW 5 was the investigating officer. On this day, January 28, 2016, his OCPD rung him to say that he had received a report of a serious assault from PW 3. He went to Isiolo District Hospital and found the deceased with deep cut wounds all over the body. He was at the Emergency Unit waiting to be transferred to a different hospital. He proceeded to the scene and found blood on the grass. Before he left the hospital, PW 4 and another officer had brought to him the 1st appellant and handed over a recovered blood stained panga. He took the 1st appellant and the panga to Muthara Police Patrol Base. On February 3, 2016 the 2nd appellant surrendered to the DCI officers and he was arrested. The officer did not subject the panga or the blood at the scene to any forensic analysis. In his cross examination, he stated that:-

' I was not able to get hold of other eye witnesses' except for PW 3 and one John Kirema Munyi. John Kirema Munyi did not testify, although he had recorded a police statement.

6. The evidence of PW 3 was that at about 9.00 am on this day he received a telephone call from members of public that someone was being cut by two people who were armed with a panga and a rungu. He rushed to the scene on a motorbike. The scene was next to Precious Academy. He found the attackers had left the scene. He talked to the deceased who lay on the ground with injuries. The deceased told him that if he died it should be known that the cause was Mutiga and his son. The deceased further told him that the attackers had taken his Kshs 30,000/=, Sumsung Galaxy mobile phone and documents, including a Cooperative Bank ATM. The deceased was from PW3's sub location, but the appellants were from the neighbouring sub location. PW 3 rung Matabithi AP Post, as he took the deceased to Isiolo Hospital. His further evidence was that he found John Kirema and other people at the scene. He stated that:-

' I didn't witness the accused persons committing offence but saw them running away from scene. I knew the accused persons had committed the offence because the deceased told me



I was told the accused persons were armed with panga and rungu. Accused persons were arrested by Administrative Police when I went to take the deceased to hospital.'

The stolen items were not recovered on the appellants, or at all. PW 3 stated that the deceased and the appellants had an outstanding land dispute over a boundary. The matter was before the Njuri Ncheke. Lastly, PW 3 was cross-examined to admit that in 2011 there was some land case in which the appellants applied to have him cited for contempt.

7. PW 2 and PW 4 rushed to the scene following a call by PW 3. At the scene they found the deceased had been taken to hospital. The members of public pointed to the direction the assailants had run. They pursued the attackers. When they passed Kipiru Primary School at Morondu they saw two people who were armed with a panga and rungu. The older of the two ran into the maize plantation and disappeared. They arrested the younger one who had a panga that was bloodstained. They took him to Isiolo Hospital and then to the police. He was the 1st appellant. His clothes were bloodstained. The alleged stolen property was not recovered. When PW 4 was asked, he informed the court that following the report they took about 20 minutes to reach the scene. From the scene, they took about one hour to get to the two attackers. This was about 2 km from the scene. According to PW 2 it took them about 30 minutes to trace the attackers.
8. The undisputed medical evidence was that on January 30, 2016 a post mortem was performed on the body of the deceased at Isiolo District Hospital. The body had multiple cut wounds on the upper and lower limbs and multiple blunt injuries on the head that had resulted into fractures that had injured the nervous system. The deceased died as a result of cardiopulmonary arrest due to severe haemorrhage due to multiple cuts that had resulted into shock.
9. In defence each appellant denied the charge in a sworn statement. The 1st appellant is the son of the 2nd appellant. The 2nd appellant is a public health officer at Buuri Sub county. His evidence was that on the material day he was on duty at Kibirichia Sub County Hospital, and that he was assigned duties in the area by his supervisor, Alfred Kathurima (DW 3) within his area of operation. He denied that he was at the scene or that he assaulted the deceased.

On January 31, 2016 he had gone to Rongai for a funeral when his wife rung him to say that people had back at home set his house on fire, and his son arrested. They included the assistant chief. On February 1, 2016 he came back home which is in Tigania East. He confirmed his house had been burnt. His wife reported to him that she had reported at Muthara Police Station but had found no assistance. He went to County Commander's Office in Meru who referred him to CID. While at CID office he was arrested on the murder allegation. He denied that he had murdered the deceased. DW 3 testified that the 2nd appellant was on duty this day. We have considered that an accused who has raised the defence of alibi has no obligation to prove it. The burden still rests on the prosecution to prove beyond reasonable doubt that the accused was at the scene at the material time and that he committed the offence in question (*Joseph Waiguru Wang'ombe -v- R [1980]eKLR*).

10. The 1st appellant stated that on January 28, 2016 he went to the shamba to harvest green grams. At about 2.00 pm their neighbour, Mzee Mwika who was in his shamba called him in a loud voice. He went towards him. He found two police officers, Chief and two motor cycle riders. Mwika told him these were the people looking for him. The officers asked for the Kshs 30,000 and phone saying that he had robbed the money from the deceased. He was not aware of the incident. He had a manila bag. He was beaten by the officers being asked about the incident he knew nothing about. He was taken to the Hospital and shown the deceased who was bleeding. He was told he had caused the injuries. He denied he had the panga, saying it was the officers who had the panga. He did not know the deceased. He stated that on this day his father (2nd appellant) was on duty in Buuri.



11. This is the evidence that the learned Judge considered and came to the conclusion that the prosecution had established beyond doubt that the appellants had jointly attacked the deceased and unlawfully, and with malice aforethought, caused his death. The trial court did not believe the appellants that on this day they were both elsewhere and not at the scene to be able to commit the offence. The appellants have attacked these findings. To them, the burden placed on the prosecution to establish their guilt beyond all reasonable doubt was not discharged. According to learned counsel for the State, the appellants were convicted on safe evidence.
12. In paragraph 52 of the judgment by the learned Judge it was indicated as follows:-
 - ' 52. PW 2 and PW 4 said that when they pursued the 2 suspects who had been described to them, they saw them ahead and one of them escaped into maize plantation while they apprehended A1 who was armed with a blood-stained panga and escorted him to Isiolo hospital where the victim had been taken for treatment. Indeed, A1 confirmed that when he was escorted to Isiolo Hospital he was shown a man whom he was told he had assaulted but he denied ever knowing the man.'
13. With respect to the learned Judge, this paragraph did not accurately capture the evidence that she had recorded from the witnesses. The record shows that PW 2 and PW 4 came to the scene after the attack, after the deceased had been taken to hospital and after the attackers had escaped. According to PW 4 it took about one hour to set their eyes on the said attackers, and this was about 2 km from the scene. Paragraph 52 of the judgment gives the wrong impression that, while at the scene the two witnesses saw the attackers trying to escape; and that they chased them and caught the 1st appellant.
14. The second problem with paragraph 52 is that, it says that the attackers had been described to PW 2 and PW 4! Who described the attackers to the police officers? What was the description? Did the person who described the attackers record a statement, and eventually testify? In our considered opinion, given the evidence, PW 2 and PW 4 were following attackers whom they did not know, and whose description they did not have.
15. Thirdly, if the 1st appellant was found with a blood stained panga, the panga was not subjected to forensic analysis to be found to be the murder weapon. In sworn defence, however, he denied being in possession of any panga.
16. The result is that there was insufficient evidence to link the two people that PW 2 and PW 4 saw and the two people who had attacked the deceased. It is also material to point out that the man who escaped arrest was not identified. He was not shown to have been the 2nd appellant. Lastly, no eye witnesses, including the stated John Kirema Munyi, were called to say that the persons who attacked and assaulted the deceased were the appellants.
17. The next aspect of the prosecution case was contained in paragraph 51 of the judgment as follows:-
 - ' 51. PW 3 also said that the deceased told him it was the accused persons were the ones who had attacked him and stole from him Kshs 30,000/=, ATM card and mobile phone.'
18. We have looked at the evidence as recorded by the learned Judge. PW 3 testified that:
 - ' I was able to talk to the deceased when he lay on the ground with injuries and said that even if he died it should be known that it is Mutiga and his son. He also said they had gone



with his Kshs 30,000/=, Samsung Galaxy mobile phone and other documents including Cooperation Bank ATM.'

PW 3 did not say that he asked which 'Mutiga and his son' the deceased was making reference to. He stated that he found members of the public at the scene where the deceased lay. One of them was Joel Kirema who assisted him carry the deceased and also heard the deceased mention his attackers. These members of the public were not called. Joel Kirema allegedly who heard the deceased mentioning the names of the attackers was not called. There was no evidence that he could not be secured to testify, after he recorded a police statement.

19. We consider that PW 3 had been cited for contempt in some previous matter he had had with the appellants. We have further considered that the deceased and the appellants had an outstanding boundary dispute before the Njuri Ncheke. That dispute could have been the motive of the attack. But it could also have been a reason to frame the appellants.
20. The trial court relied on various cases, including *Choge -v- Republic [1985] KLR 1* and *Republic -v- Olulu s/o Eloku (1938) 5 EACA 39*, which underlined the principle that there need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such a declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.
21. It is our view that had the trial court considered the totality of the matters we have pointed out in relation to the evidence called by the prosecution, it would have found that it was not safe to rely solely on the evidence of PW 3 to find that the deceased had made a dying declaration naming the appellants as his attackers. If indeed there was a dying declaration, the identities of the attackers were not clear or certain, and, in view of the dispute between the deceased and the appellants, there was need for corroboration. There was no corroboration.
22. We hope we have said enough to show that the conviction of the appellants was not based on sound and irrefutable evidence. The prosecution did not discharge the burden required of it. We allow the appeal, quash the conviction and set aside the sentence. The appellants shall forthwith be set at liberty unless otherwise lawfully held.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE 2023

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

