Kasyoka v Republic (Criminal Appeal 28 of 2020)
[2023] KECA 723 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 723 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 28 OF 2020

MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA

JUNE 9, 2023

BETWEEN

GERALD NGALI KASYOKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment delivered in the High Court of Kenya (S.N. Mutuku, J.) on 21st September 2017 in HCCC No. 57 of 2011 at Nairobi)

JUDGMENT

1. The appellant, Gerald Ngali Kasyoka, was charged with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that on the night of 29th and June 30, 2011 at Eastleigh in Kamukunji District within Nairobi Area of the former Nairobi Province, he murdered Rose Mutinda Mbithi (the deceased).

2. He pleaded not guilty and the case proceeded to trial, where the prosecution called 9 witnesses. After hearing the evidence, the trial court convicted the appellant and sentenced him to death as by law prescribed. The appellant was aggrieved by the conviction and sentence, and has preferred an appeal to this Court on grounds set out in a supplementary memorandum of appeal that; the learned judge was in error in failing to find that the offence of murder was not proved beyond reasonable doubt, and whether the learned judge misapplied the law by meeting out a mandatory death penalty sentence.

3. Both the appellant and the respondent filed written submissions. When the appeal came up for hearing, learned counsel for the appellant Ms. Mukobi, briefly highlighted the submissions and stated that two main issues fell for determination which were that, the offence of murder was not proved and that, the trial court misdirected itself in imposing the mandatory death sentence on the appellant.

4. On the complaint that the offence was not proved, it was submitted that, the essential ingredient of malice aforethought was not established; that none of the prosecution witnesses testified as to how the

deceased died, and neither did they provide any direct or circumstantial evidence that pointed to the appellant's guilt. It was further submitted that the results of the vaginal swab did not link the appellant to the deceased's death. Counsel concluded that the circumstantial evidence adduced did not meet the threshold to prove that the appellant killed the deceased.

5. Regarding the mandatory death sentence imposed on the appellant, it was submitted that the Supreme Court decision of *Francis Karioko Muruatetu vs Republic* [2017] eKLR had declared the mandatory nature of the death sentence to be unconstitutional, and therefore it was wrong for the court tohave imposed the death sentence on the appellant, and further that the sentence imposed did not take into account the appellant's mitigation.

6. In response, Mr. Okachi, learned prosecution counsel opposed the appeal and submitted that there was sufficient evidence demonstrating that malice aforethought was established; that the appellant and the deceased were related, and were living together; that the deceased was found dead in the house after the appellant left; that there was further evidence that the appellant's clothes and shoes were stained with the deceased's blood, which evidence placed him at the scene.

7. On the sentence, counsel submitted that the sentence imposed was constitutional and lawful, and prior to being sentenced, the appellant was afforded an opportunity to mitigate.

8. This is a first appeal. In the case of *Gabriel Kamau Njoroge v Republic* [1982 – 88] 1 KAR 1134, this Court outlined the duty of a 1st appellate court thus;

> "It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen nor heard the witnesses and make due allowance for this."

9. Bearing this guidance in mind, we consider that the issues for determination are;

    i. whether the circumstantial evidence adduced against the appellant was sufficient to sustain his conviction

    ii. whether mens rea/malice aforethought was established beyond reasonable doubt to warrant a conviction of murder; and

    iii. whether the sentence meted out was manifestly harsh and excessive.

10. So as to address the appellant's complaints, we consider it essential to set out the evidence that was before the trial court. The prosecution's case was that the appellant is the last born son of the deceased. He and his brother Francis Kivai Kasyoka, PW3, (Francis) were the deceased's only children. She was a widow having lost her husband some years earlier. She lived with the appellant in a single-roomed, iron sheets structure situated in Wood Street, Eastleigh.

11. On 30th June 2011, Florence Kamene Mbithi, PW 1 (Florence), a vegetable seller based at Machakos was informed by one Wanyua that she had not seen her sister the deceased. So Florence went to the deceased's house and found the appellant, the deceased's son who lived with the deceased locking the door with a padlock. He was holding a paper bag and that, upon enquiry as to the deceased's whereabouts, he told her that the deceased had left to go to work. When she looked at him, she saw his shoes and the t -shirt he was wearing were blood stained. And when she looked into their iron sheet house, she saw that items were all scattered in the house. She became suspicious, whereupon, she called one Mutuku, the landlord who was also a neighbour.

12. Upon informing him what she had seen, Mutuku broke open the door to the house. Inside the house was a stone building block lying on iron sheets with blood stains and there was blood everywhere. She stated that they did not see the deceased's body at first, but after searching around the house, they saw a carpet in the middle of the room. When they lifted it, they saw a heap of wet uneven soil and after removing some of the soil, they saw the deceased's body covered in a leso.

13. Florence reported the discovery to the police who came to the scene in Eastleigh. They removed the body and took it to the City Mortuary.

14. In cross examination, she confirmed that the appellant used to stay with the deceased and that he used to threaten the deceased with death. She did not know when the deceased was killed.

15. On the material day, Charles Musyoki Nthuka PW2, testified that he was in his house in Eastleigh Section 3, when Florence, his aunt told him that she suspected the appellant of having killed his mother. They met at Pangani Police Station and were escorted to the scene by the police. When they opened the door, they found the body of the deceased half buried in the soil and half covered in a carpet. The body was blood stained and household items were scattered on the floor. He stated that the deceased had an injury on the head near her left ear. It was a big injury like a heavy object had been used to hit her on the head.

16. Francis, PW3, was told by PW2 that his mother had been injured. He rushed to her house in Wood Street, Eastleigh where she lived with his brother Gerald, the appellant. He found a police vehicle, Florence and a crowd of people outside the house. He saw the deceased's body covered with a carpet. The body was uncovered and photographs were taken. He stated that he later identified her body for purposes of post mortem with PW2 and John, their uncle.

17. On the night of 29th and June 30, 2011, John Ngulukyo Kisule PW4, heard a sound like something was being hit, but the noise later stopped. At 8.30. am, Florence told him that she had seen something inside her sister's house. They broke open the door, and found clothes scattered everywhere. A blood stained stone building block was inside the house. They also saw a carpet and when they removed it, they saw the body of deceased. They reported the discovery to the police at Pangani Police Station.

18. Lawrence Kinyua Muthami, PW5, a government analyst testified that on July 7, 2011, they received items from Cpl Joseph Mulwa PW 8 of Pangani Police Station. The included;

    1. Item A: blood sample indicated as of deceased.

    2. Item B: vaginal swab indicated as of deceased.

    3. Item C: blood sample indicated as of appellant Gerald.

    4. Item D: was a pair of greenish shoes indicated as worn by appellant.

    5. Item E: was blue jeans trouser of appellant.

    6. Item F: was a grey polo T-shirt indicated as of appellant.

    7. Item G: was a stone block in a carton indicated as suspected murder weapon.

19. He was requested to examine the items and determine the presence and source of any blood stains. Upon examination, found the following:

    1. Jean trouser Item E; polo t- shirt Item F; shoes Item D; and stone Item G were all lightly stained with human blood.

2. DNA profile from stains on polo T-shirt (F); and stone (G) both matched DNA profile generated from blood sample of Item A of the deceased.

3. DNA profiles generated from item (E) and item (D) indicated as of appellant matched DNA profile from Item C blood sample of appellant,

4. Vaginal swab did not generate DNA profile.

20. Senior Sergeant Martin Mwaka visited the scene on June 30, 2011 at 3.00 pm accompanied by Cpl Joseph Mulwa, and took the photographs of the scene, they ransacked house, and came across the blood stained mat and building stone, as well as the partly buried body of the deceased. Senior Sergeant Mwaka took 11 photographs at the scene including;

1. Photo 1 and 2 are general views of the scene showing entrance as indicated by CPL Mulwa.

2. Photo 3 shows door locked with padlock.

3. Photograph 4 shows ransacked house the inside and blood stained mat.

4. Photo 5 is a big close up view of blood stained mat.

5. Photo 6 shows close up view of the body after removing the mat.

6. Photo 7 shows full length view of the body after uncovering it.

7. Photos 8 and 9 is full length of the body.

8. Photographs 10 and 11 is close up view of the face of deceased and injury at the back of the head.

21. The officer certified that the film and photos were processed and printed under his supervision and the negatives had not been tampered with. Dr. Joel Mungai, PW7, the pathologist examined the body of the deceased. He testified that there were bruises and lacerations on the left side and back of the head with fracturing of the skull exposing the brain. There were multiple fractures on 3rd and 7th ribs. There was blood in the chest and lungs with lacerations. There was swelling and bruising of the vulva. In his opinion, cause of death was due to blunt trauma to the chest and head.

22. The appellant gave unsworn evidence. He raised an alibi defense, that he was not at home on the night of 29th and 30th June 2011. He said he had been working at Garissa Lodge in Eastleigh offloading goods from a lorry. When he returned home in the morning, he met his aunt, Florence at the main gate of their house who requested to know where the deceased was. He told her that he did not know; that he then decided to pass time within Eastleigh and after 30 minutes, he returned to find people surrounding their home. He heard someone say, "that is the one" while pointing at him. He was assaulted, his clothes were torn and he was arrested.

23. So as to prove the offence of murder, the prosecution must establish three elements. First, the death of the deceased and the cause thereof, secondly, that the death of the deceased was caused by an unlawful act or omission by the accused person; and finally, that the accused person committed the unlawful act or omission with malice aforethought.

24. In the instant case, the fact of the deceased's death is not in dispute. The post-mortem report of Dr. Mungai, the pathologist, indicated that the deceased sustained a fracture of the skull and multiple fractures on the 3rd and 7th ribs resulting to her death. The post-mortem report indicated that the cause of the deceased's death was due to blunt trauma on the chest and the head.

25. Was the appellant responsible for the deceased's death? In concluding that the appellant was responsible for the deceased's death, the trial court stated;

> " This evidence is sufficient to me, as proof beyond reasonable doubt the death of the deceased, which death was caused by unlawful act, multiple injuries, caused by blunt object, occurred. The fact that the body was concealed under the soil inside the deceased house, and the shallow grave covered with a floor mat means that the culprit intended to conceal the fact of death. It is also obvious to this court that the circumstances of this case point irresistibly towards the accused person to the exclusion of any other person as the person who caused the death."

26. Since there was no one who witnessed how the deceased died, the prosecution's case was founded on circumstantial evidence that pointed to the appellant as the person who murdered the deceased.

27. This Court has variously laid out the principles to be applied to cases relying on circumstantial evidence to arrive at a conviction. They are that;

(a) the inculpatory facts must be incompatible with the innocence of the accused;

(b) they must also be incapable of explanation upon any other hypothesis other than that of guilt of the accused;

(c) there must be no other co-existing circumstances weakening or destroying the inference; and

(d) every element of the unbroken chain of evidence to prove the case must be proved by the prosecution.

28. In the case of *PON vs Republic* [2019] eKLR this Court stated;

> " To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that guilt of the suspect should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the suspect not guilty. This principle has been applied for years in this jurisdiction and the two leading judicial authorities that have stood the test of time are Rex V Kipkerring Arap Koske & 2 Others [1949] EACA 135 and Simoni Musoke V R [1958] EA 71. In Rex vs. Kipkerring (supra) the court explained that;
>
> > " In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused"

29. The facts of the instant case were that; the deceased's body was found in a shallow grave under a carpet in her house in Eastleigh where she resided with the appellant. According to Dr. Mungai, the postmortem report indicated that the cause of the deceased's death was blunt trauma on the chest and the head; that the deceased sustained a fracture of the skull and multiple fractures on the 3rd and 7th ribs. After examining the blood on the stone and on the appellant's t-shirt, Lawrence Muthuri, the government chemist found that the blood type belonged to the deceased.

30. The witness evidence was clear that the appellant was the last person to have been in the house with the deceased. Florence saw him leaving the house on the morning of 30th June 2011, with blood stained shoes and t-shirt. He was locking the house with a padlock. When asked about the deceased's whereabouts, he lied that she had gone to work, but in point of fact, she was lying dead in the house. Florence and Mutuku discovered her body after they broke the padlock, and went inside the house. There was blood all over the room which was in disarray, which pointed to a struggle. The blood on the appellant's t-shirt matched the DNA of the deceased.

31. We are satisfied that, the facts of the case all pointed to the appellant as the last person to have been with the deceased. The appellant's actions of locking the deceased in the house after she had died from severe injuries on her head and chest caused by blunt force trauma, and lying to Florence that he did not know of her whereabouts yet he had buried her in a shallow grave in the house and concealed her body under a carpet. To cap it all, the t-shirt he was wearing was stained with her blood. No doubt, the inculpatory facts are incompatible with his innocence, and the only conclusion that can be reached is that the appellant murdered the deceased.

32. As to whether malice aforethought was proved to the required standard, section 206 of the *Penal Code* defines 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."

33. In the case of *Rex vs Tubere s/o Ochen* (1945) 1Z EACA 63, the then Eastern Court of Appeal observed;

> " 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 vs DPP* (1974) A.C.it was held that;

> " 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."

34. The injuries the deceased sustained, are demonstrative that the appellant intended to kill or cause grievous harm to the deceased. Dr Mungai's report indicated that the cause of the deceased's death was blunt trauma on the chest and the head; that the deceased sustained a fracture of the skull and multiple fractures on the 3rd and 7th ribs. A building stone covered with the deceased's blood was found at the scene. The stone was used to inflict the blunt injuries on the deceased that caused her death. We

find, as did the High Court, that malice aforethought on the part of the appellant was proved beyond reasonable doubt.

35. In his defence, the appellant stated that he was not at home on the night of 29th and 30thJune 2011 as he working at Garissa Lodge in Eastleigh offloading goods from a lorry; that he returned home in the morning and met his aunt, Florence, at the main gate of their house; that she asked him where the deceased was and he told her that he did not know. Thereafter, he decided to pass time within Eastleigh and after 30 minutes, he returned home. He said he found people surrounding their home and heard someone say, "that is the one" while pointing at him. He was subsequently arrested.

36. Contrary to his evidence that he was returning from working in Eastleigh, Florence's evidence was that the appellant was leaving the house. Indeed, he locked the door with a padlock and went away. When he came out of the house his clothes were blood stained. Inside the house there were blood stains on the floor, on the stone and the carpet found in the house. The blood stains on his t-shirt and in the house matched the DNA profile generated from the blood of the deceased. The appellant did not offer any explanation as to why he had the deceased's blood on the t-shirt and shoes he was wearing.

37. The High Court found the appellant's alibi defence to be implausible and unbelievable and an afterthought having been raised 4 years after he was charged with murder. Upon careful examination of the prosecution witnesses' evidence against his alibi defence, we too find that it did not in any way displace the prosecution's case. Having been raised so late in the day, it was an afterthought which the prosecution had no way of verifying. As did the trial judge, we too find the defence to be incredible, and inconceivable,more particularly having regard to the macabre circumstances of the case, and the High Court was right to dismiss it.

38. All in all, the prosecution having proved all the ingredients of the offence of murder to the required standard, we find that the only conclusion that can be reached is that the appellant murdered the deceased, and as such, the conviction was safe.

39. 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 December 14, 2017 to be unconstitutional."

40. 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*."

41. So that, the death sentence remains constitutional, and it is only the mandatory imposition that was rendered unconstitutional. In a ruling dated October 5, 2017, the appellant was had been accorded an opportunity to mitigate, and through his counsel, he informed the court that he did not wish to mitigate. On that basis, the court ordered the death sentence.

42. Since the death sentence is constitutional, and the appellant having been found to have declined to mitigate in the trial court, and no further mitigation having been placed before this Court, we dismiss the appeal against sentence.

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

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH 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